No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1948

JESS LARSON, AS WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR, PETITIONER

v.

DOMESTIC AND FOREIGN COMMERCE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The District Court of the United States for the District of Columbia filed no opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 55–59) is reported at 165 F. 2d 235.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1947 (R. 59). The petition for a writ of certiorari was filed on March 5, 1948, and granted on April 19, 1948 (R. 62). The juris-

diction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

1. Whether a suit brought against the head of the War Assets Administration, an unincorporated nonsuable government agency charged with the disposition of surplus government property, to enjoin disposition of coal possessed by the United States and to which the United States claims title, is an unconsented suit against the United States which should be dismissed on the complaint for want of jurisdiction, where the plaintiff's sole claim is that the United States contracted to sell the coal to plaintiff, that title thereto passed before delivery or payment, and that delivery of the coal was wrongfully withheld from plaintiff after a dispute as to the plaintiff's compliance with the contract terms.

2. Whether, in these circumstances, respondent has an adequate remedy at law barring equitable relief.

3. Whether the Court of Appeals may properly determine, on respondent's complaint, that the coal involved is of such a "peculiar nature" as to warrant equitable relief.

[1] Effective September 1, 1948, 28 U. S. C. 1254 (1) became the jurisdictional basis for cases of this type. Pub. L. No. 773, 80th Cong., 2d Sess.

STATUTE INVOLVED

Section 15 of the Surplus Property Act of 1944, Act of October 3, 1944, c. 479, 58 Stat. 765, 772–773, 50 U. S. C. App. 1624, provides as follows:

> SEC. 15. (a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper: *Provided, however,* That in the case of raw materials, consumer goods, and small tools, hardware, and nonassembled articles which may be used in the manufacture of more than one type of product, no extension of credit under this Act shall be for a longer period than three years.
>
> (b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.[2]

[2] The Act of September 18, 1945, c. 368, 59 Stat. 533, 50 U. S. C. App. 1614a–1614b, transferred the powers, authority, and duty of the Surplus Property Board to a Surplus Property Administrator.

STATEMENT

This suit was instituted by a complaint for an injunction and a declaratory judgment filed on April 29, 1947, in the United States District Court for the District of Columbia (R. 1–32). The original defendant was Robert M. Littlejohn, then the War Assets Administrator and Surplus Property Administrator, who was sued as such (R. 1, 2).[3] The facts alleged in the complaint and appearing in the exhibits thereto[4] were as follows:

[3] On April 19, 1948, this Court granted the Government's motion to substitute Jess Larson, present War Assets Administrator and Surplus Property Administrator, as petitioner herein (Journal of Sup. Ct. April 19, 1948, p. 221). General Littlejohn resigned those offices on November 28, 1947, and Mr. Larson assumed office the same day.

The War Assets Administration, headed by the War Assets Administrator, was established by Executive Order No. 9689 (dated January 31, 1946) ("Consolidation of Surplus Property Functions"), 3 CFR, 1946 Supp., pp. 93–94, as amended by Executive Order No. 9707 (dated March 23, 1946), 3 CFR, 1946 Supp., pp. 114–115. These Orders transferred, *inter alia*, the functions and authority of the Surplus Property Administrator and the Surplus Property Administration (see (fn. 2, *supra*, p. 3) (except those relating to surplus property in foreign territory) to the new War Assets Administration and the War Assets Administrator. Reorganization Plan 1 of 1947, effective July 1947, 12 Fed. Reg. 4534–5, gave non-temporary legislative status, in effect, to the War Assets Administration and its Administrator.

[4] The exhibits are properly considered a part of the complaint for all purposes. F. R. C. P., Rule 10 (c); *Peoples Natural Gas Co.* v. *Federal Power Commission*, 127 F 2d 153, 155–6 (App. D. C.), certiorari denied, 316 U. S. 700; *Avalac, Inc.* v. *Hat Corporation of America*, 166 F. 2d 286, 289 (C. C. A. 3).

Respondent is a Delaware corporation, with its principal office in Washington, D. C., engaged in the export and import business, particularly in coal (R. 2). During 1946, it had purchased from the War Assets Administration, at a price of $1.75 per ton, government-owned war surplus coal located at various Army camps in Texas and adjacent States, which respondent then sold for export (R. 2). On March 11, 1947, the War Assets Administration, through its Dallas Regional Office, invited a bid from respondent for another 10,000 tons of government-owned bituminous coal, stating "this coal is offered F. O. B. cars, Camp Maxey, north of Paris, Texas" (R. 2–3, 11).[5] On March 13, 1947, respondent telegraphed its offer to purchase the coal "on same terms and conditions and made a continuing part of our recent contract at same price"; it indicated the coal was to be exported, and proposed that "contract shall be on cash basis, based on railroad scale weights as heretofore and payment made upon presentation of your invoices to same bank

[5] At all times relevant to this case, War Assets Administration was the proper disposal agency for surplus coal, as designated in its own orders and regulations as successor to the original Surplus Property Board and Surplus Property Administrator. 32 CFR, 1946 Supp., 8301.2 (g). See Surplus Property Act of 1944, as amended, sections 6, 9, 10, 11, and 15, 50 U. S. C. App. 1615, 1618, 1619, 1620, and 1624 (for statutory authority of the War Assets Administration and War Assets Administrator as successor to the Surplus Property Board and as a disposal agency). Cf. fns. 2 and 3, *supra*, pp. 3–4.

in Dallas" (R. 3, 12). War Assets Administration's answering letter, of March 19, accepted the offer of $1.75 per ton, and also "your terms of placing $17,500 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank," adding that respondent might prefer to deposit the $17,500 with War Assets' Dallas office for deductions as shipments were made, any balance to be refunded to respondent (R. 3, 13).

Respondent then executed War Assets' forms of "Offer to Purchase" and "Sales Memorandum" (R. 3, 14–17). The standard conditions of sale contained in both of these documents stated that "Unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check, cashier's check, or money order prior to shipment of the property or its removal by Purchaser" (R. 15, 17), and also that "Unless otherwise specifically stated in the Sales Memorandum, all sales are made f. o. b. common carrier (cars or trucks) and shipping expenses will be paid by Purchaser" (R. 15, 17). The face of the Sales Memorandum signed by respondent also contained the following typewritten statement in the box labeled "Terms": "Cash on presentation of wt. tickets as shipped" (R. 16).[6]

[6] The "Offer to Purchase" and the "Sales Memorandum" also provided, among other things, that (a) the Sales Memorandum and its standard conditions of sale constituted the entire agreement and extrinsic variations, modifications, or

Respondent forwarded these executed documents to War Assets' Dallas office by letter of March 28, 1947, in which it stated that $5,000 (apparently furnished by the Penn-Pocahontas Coal Company, of New York, which was to export the coal) was that day being deposited with the designated Dallas bank "to apply against the first shipments of this coal," and that "immediately this shipment begins to move, the balance of the funds necessary to meet your invoices upon presentation at the bank, will be transferred by the New York bank to the First National Bank of Dallas" (R. 3–4, 18). In immediate response, War Assets wired on April 1st that "First National Bank Dallas refuses to guarantee payment for full amount unless $17,500 is on deposit their bank for this purpose. Unless $17,500 is deposited First National Bank Dallas for payment of total quantity this coal by noon April 4 sale will be cancelled and other disposition made" (R. 4, 20).

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representations made by the seller's agents were to be of no effect; (b) on default by the buyer in making payment or otherwise, War Assets might on ten days notice rescind the sale or resell for the purchaser's account; (c) risk of loss shall be upon the purchaser if he fails to issue shipping instructions or to remove the goods on time, and upon the seller if the loss occurs prior to timely removal (but the seller's liability was limited to replacement of the property or return of the amount paid); and (d) War Assets reserved the right to cancel the contract where the purchaser was an agent for an undisclosed principal (R. 15, 17).

On April 4th, respondent telegraphed War Assets that it had placed with the Dallas bank a "letter of credit covering the balance of $12,500" and "this places on hand in the First National Bank Dallas the full amount of $17,500 to meet this purchase". (R. 4, 22). The same day, War Assets' Dallas regional office wired back that unless $17,500 was deposited with that office or on deposit with the Dallas bank, the telegram was to serve as formal notice that the sale would be cancelled ten days from that date (R. 4-5, 23). On inquiry by respondent from the Dallas bank as to why the letter of credit did not satisfy the Government, the bank wired, on April 10th, that the actual credit from the New York Corn Exchange Bank had not yet been received and War Assets was awaiting its arrival. The telegram also stated that War Assets "express preference for funds to be placed here for payment invoices rather than availability against sight drafts on New York Bank" (R. 5, 24). The Dallas bank's confirmatory letter, likewise on April 10th, reiterated that War Assets, "prefer that the funds should be made available to them here at this bank rather than waiting for a sight draft drawn under a letter of credit to be paid in New York." The bank added that, if the New York bank requested it to do so, it would pay the drafts in Dallas "without this bank assuming any responsibility whatsoever * * * but we do not care to assume any responsibility

for the payment of the drafts in New York City" (R. 25).

Respondent then had the letter of credit issued by the Corn Exchange Bank, which originally provided for payment of drafts in New York, as War Assets and the Dallas bank correctly understood (R. 5, 26), amended so as to permit negotiation in Dallas, not later than June 7, 1947 (R. 5, 27). The Dallas bank then sent the War Assets Administration a letter, dated April 16th, informing War Assets that that bank had received a telegram from the New York bank stating that the amendment authorized the Dallas bank to *negotiate* the drafts and documents; the Dallas bank added that it now appeared to have the necessary authority to make *payment*, but only if the original letter of credit as well as the invoices and proper shipping documents, were presented (R. 5, 28).[7] On the same day, War Assets wired respondent that its "credit division has been notified by First National Bank, Dallas, it does not have sufficient authority to pay for this material upon presentation of invoices. This is formal notification sale is cancelled" (R. 5,

[7] Three days later, on April 19, 1947, a letter (not included in the record), was written by the Dallas bank to War Assets' Dallas office, quoting a correcting telegram which the bank had received on that day from the Corn Exchange Bank, which telegram stated that the New York bank's earlier wire "should have read drafts and documents presented at your office not later than June seventh instead of negotiated at your office stop pay drafts when presented at your office debiting our account with your goodselves."

29).[8] Respondent immediately protested, claiming that it had complied with all contract requirements, and that a *bona fide* letter of credit had been established in accordance with the usual commercial procedure; it stated that it regarded the contract as still in effect (R. 6, 30–31). Respondent alleges that it received no replies to these telegrams of protest (R. 6).

Shortly thereafter, respondent was informed that the War Assets Administration had entered into a new contract to sell the coal in question to another concern, the Midland Coal Company, but that delivery had not been made at the time suit was brought (R. 6, 7). Respondent had itself, immediately after receiving War Assets' acceptance of March 19th, resold the coal to the Penn-Pocahontas Coal Company, at a price of $2.75 per ton plus 45% of any receipts in excess of $3.75 per ton on resale by Penn-Pocahontas (R. 7). The complaint also alleged that Penn-Pocahontas had meanwhile resold the coal to the Portuguese government, at a price between $8.50 and $9.00 per ton f. o. b. Texas port (R. 7).

The complaint concluded by averring that legal title to the coal had passed to respondent when War Assets accepted its purchase offer on March 19, that respondent had fully complied with all the terms of the contract, that if it did not acquire

[8] The complaint nowhere alleges that War Assets Administration ever itself saw the letter of credit prior to cancellation. Cf. R. 39, 41, 42.

the coal its standing with the trade and the Penn-Pocahontas Company would be lost, that it would lose its profits and be liable in damages to the repurchaser, and that because of the difficulty of ascertaining either damages or profits it had no adequate remedy at law (R. 6–8). The prayer was for a temporary restraining order, preliminary injunction, and permanent injunction prohibiting petitioner's predecessor from cancelling the sale to respondent, and from reselling or delivering the coal to any other person; a declaration that the sale to respondent was still valid, and the later sale to Midland Coal Company invalid, was also asked (R. 8–9).

On the basis of the complaint, and a supporting affidavit of respondent's president generally affirming the complaint's allegations (R. 33–34), a temporary restraining order was issued *ex parte* on the day the complaint was filed (April 29, 1947), which restrained any disposition of the coal other than to respondent (R. 35–36). The matter of the issuance of a preliminary injunction was set for hearing on May 6, 1947 (R. 36).

On that day, petitioner's predecessor moved to dismiss the complaint on the grounds (a) that the action was an unconsented suit against the United States for specific performance of a contract to sell coal, and (b) that the complaint failed to state a claim upon which relief might be granted (R. 36–37). There was also filed an affidavit of Walter N. Day, Director of the Credit Division

of War Assets, to the effect that (i) it was the War Assets Administration's policy to retain title to property until it was turned over to a common carrier, at which time payment was due (R. 38–39), (ii) that this policy was embodied in various provisions of War Assets' standard conditions of sale (R. 39), (iii) that War Assets understood the instant agreement to require that funds for full payment be deposited by respondent with the Dallas bank prior to any shipments (R. 39–40), (iv) that in War Assets' view respondent had never complied with these terms of the contract (R. 40–43), and (v) that had War Assets been willing to accept a letter of credit in place of the original agreement for cash, the one proffered by respondent would have been unsatisfactory for several reasons (R. 42–43).[9] Petitioner's predecessor likewise filed an affidavit of W. T. Lennon, an employee of the Administration, that prior to the institution of the action, personnel and equipment had been directed to Camp Maxey to load the

[9] The defects in respondent's letter of credit proposal were said to be (R. 42): (1) shipment in full was required by May 31, 1947, but no shipping instructions had been received, leaving War Assets without assurance of shipment in full by that date; (2) under the letter of credit, payment was conditioned upon presentation of the original and duplicate of a letter from Penn-Pocahontas (the repurchaser) to respondent giving certain shipping instructions (R. 26), which letters War Assets had never seen or heard about; (3) the time for presentation, June 7th, might prove insufficient; and (4) the original letter of credit, which War Assets had never seen, had to be presented for each payment.

coal for delivery to Midland Coal Company, and that the restraining order prohibiting the loading had damaged War Assets (R. 43–44).[10]

After argument on respondent's motion for a preliminary injunction (R. 48), the district court dissolved the temporary restraining order and denied the application for a preliminary injunction on the ground "that this suit is in effect a suit for specific performance and the United States is a necessary party; and this Court is without jurisdiction" (R. 48). After respondent's counsel indicated, in open court, his intention to appeal, the district court stated that "if you want to get a stay order from the Court of Appeals, I think you had better let me pass on the motion to dismiss, because I think this opinion so far decides that question" (R. 48), and sustained the motion to dismiss (R. 48). The order, judgment, and decree, filed May 9, 1947, denied respondent's motion for a preliminary injunction, granted petitioner's predecessor's motion to dismiss the complaint, and dismissed the complaint with prejudice (R. 49–50).[11]

[10] Petitioner need not, and does not here, rely on the affidavits of Day and Lennon, since the question now presented arises on the allegations of respondent's complaint and the exhibits thereto. Cf. *Land* v. *Dollar*, 330 U. S. 731, 735.

[11] Delivery of the coal to another buyer was enjoined, first by the district court and then by the court of appeals, pending final disposition of the appeal to the latter court. Although the Government sought to have a $20,000 injunction bond given by respondents, the only protection to the United States consisted of an inadequate injunction bond of $1,000 (R. 50).

Appeal was taken to the United States Court of Appeals for the District of Columbia[12] which reversed and remanded the case, holding that the district court "erred in dismissing the complaint in the belief that it lacked jurisdiction" (R. 59). The court of appeals stated that "it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated" between the parties, and whether title had passed as alleged by respondent (R. 58). The court was also of the view that, if the contract had been breached by War Assets Administration to respondent's detriment, "the peculiar nature of the coal involved

[12] In the court of appeals, respondent filed, together with a motion for leave to file, an affidavit of its president, never received by the district court, in opposition to the Lennon affidavit filed by petitioner's predecessor in the district court (R. 51–54). This affidavit details respondent's version of its dealings with officials of the War Assets Administration, on and after April 18, 1947, and sets forth respondent's information as to the equipment and personnel directed by the Administration to Camp Maxey for the purpose of loading coal. The court below never passed upon respondent's motion for leave to file this affidavit. We believe this affidavit to form no part of the true record in this case, since it was not filed in the district court nor received by the court of appeals. Moreover, we believe the affidavit to have no bearing on any question presented to this Court. For these reasons, petitioner and his predecessor have not sought to file answering affidavits, although several of the respondent's affidavit statements are believed to be inaccurate. Cf. note 10, *supra*, p. 13.

soundly bases [respondent's] resort to equity for relief" (R. 58).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In failing to hold that this suit is one against the United States to which the United States has not consented.

2. In failing to hold that the district court does not have jurisdiction of this suit.

3. In holding that the district court could not determine whether or not it had jurisdiction of this suit without a trial and a determination of respondent's allegations that title to the property had passed to it and that its contract had been breached to its detriment, and in holding that the district court has jurisdiction to try and determine those issues in this action.

4. In holding that petitioner's predecessor's discretion was fully "exercised at the time the contract with appellant was entered into" (R. 58), and that he thereafter possessed no discretion in the matter.

5. In holding that the district court had equitable jurisdiction to grant the relief prayed for, that the respondent did not have a plain, adequate, and complete remedy at law, and that the nature of the coal involved was so "peculiar" as to warrant resort to equity for relief.

6. In reversing the judgment of the district court dismissing the complaint herein.

SUMMARY OF ARGUMENT

I

This suit is against the United States, which has not consented to be sued; it must therefore be dismissed as outside the jurisdiction of the district court.

A. By means of a suit nominally directed against petitioner's predecessor, respondent has sought to compel specific performance of its sales agreement with the United States. Its aim is to force petitioner, in this Court's words, to do "the very things which when done would constitute a performance" of the contract by the United States, and to forbid him from "the doing of those things which, if done, would be merely breaches of the contract" by the United States. But this is exactly what respondent cannot do, under the unchallengeable rule that courts have no jurisdiction of suits seeking, in effect, specific enforcement of the sovereign's contract. *E. g. Goldberg* v. *Daniels*, 231 U. S. 218. Not only is a suit of such a nature "simply an attempt to make the [United States] itself, through its officers, perform its alleged contract, by directing those officers to do acts which constitute[d] such performance," but it requires the defending public official to act in his official capacity in order to comply with the court's decree, and this reveals the sovereign as the real party in interest. Here, for instance, petitioner could act only as War

Assets Administrator in ordering his subordinates to load the 10,000 tons of coal on freight cars in accordance with respondent's shipping instructions, and to accept payment as proffered by respondent. And, contrary to respondent's contentions, this is not any the less a suit for specific performance because respondent alleges that title to the coal has already passed to it; nor is the sovereign immunity barrier less applicable because the case involves a single disposition of surplus property and not an agreement concerning, as respondent puts it, "continuing sovereign functions such as carrying the mail."

B. For several separate reasons, the rule of *United States* v. *Lee*, 106 U. S. 196, and *Land* v. *Dollar*, 330 U. S. 731, does not apply in the case of an ordinary sale of government property and of the normal suit for specific performance of a public contract, such as this. First, the *Land* opinion expressly distinguishes an "attempt to get specific performance of a contract to deliver property of the United States." Secondly, it is an essential prerequisite in the *Lee-Land* line of authorities, as in all suits against an official, that the plaintiff assert a substantial claim that the defendant is exceeding his statutory or constitutional authority. Here, there is no such allegation, nor could there well be, since government contracting officials endowed with the breadth of statutory authority granted to the War Assets Administration do not normally ex-

ceed their power when they misconstrue the terms of an agreement and thus cause an actionable breach by the United States. Thirdly, the *Lee* and *Land* decisions require the complaining party to state a private common-law tort claim against the defendant, but respondent neither asserts such a claim in its complaint, nor could it well do so. Some argument is now presented that a conversion of the coal occurred, but if that be so, the tort-feasor is solely the United States. The complaint does not allege any personal misconduct, or even knowledge, on the part of the petitioner or his predecessor; the subordinate officials who did participate in the transaction are not tort-feasors under the general rules pertaining to conversion; and even if these subordinate officials be thought to be guilty, it is well settled that their wrong cannot be imputed to their superior (the War Assets Administrator). In any case, the present petitioner, who became Administrator several months after this action was commenced, is not responsible for torts which may have been committed by his predecessor; and, once again, the official relief demanded by respondent shows that petitioner is not being sued as a private tort-feasor. Fourthly, another fundamental factor in the *Lee-Land* authorities is the plaintiffs' claim that the property never belonged to the United States, coupled with an acknowledged substantial interest in the property and possession of it before the United States.

asserted any claim. In the present case, on the other hand, respondent, which has never possessed the coal, must peg its entire claim of a "property interest" on the nebulous, technical, and confused doctrines of passage of "title" under the law of sales. Lastly, the judgments in the earlier cases would not affect the rights of the absent United States, while respondent's prayers (for declarations that "the sale of this coal to plaintiff * * * is still valid and in effect" (R. 8) and that "the purported sale to the Midland Coal Company is illegal" (R. 9), and for an injunction against "cancellation of the sale to the plaintiff" (R. 8)) would necessarily require direct determination of the present status and meaning of the Government's contract, as well as adjudication of its ownership. In our view, respondent's action satisfies none of these five requirements of the *Lee-Land* doctrine; certainly, it does not fulfill them all.

C. Since the contract which respondent seeks specifically to enforce concerns property, an alternative way to view the action is as one to try the title to, and right to possession of, the coal. The established principle is that, except perhaps for cases fully within the *Lee* rule, a suit directly involving the use, possession, or title of property in which the Government claims an interest is a barred suit against the sovereign. The authorities demonstrate that this is true whether or not the governmental title or right is

acknowledged, at least in every case in which the claim of the United States is not merely frivolous. The substantiality of the Government's claim in this case is vindicated in Point III.

D. Our argument that this is an impermissible suit against the United States rests not only on precedent, history, and established principle, but on strong considerations of policy, as well. While it may not stand in high repute with many jurists and lawyers, the sovereign immunity doctrine is imbedded in the Constitution and continues to be largely accepted by Congress and the State legislatures which have power to abolish the privilege. Therefore, it must still be given its due place. The doctrine of sovereign immunity can have no more justified application than in the field of normal government contractual relations, where the private party is a voluntary participant in a consensual transaction, generally commercial in character, and knows both the Government's contractual privileges and the limitation of his remedies to a suit for money damages in the Court of Claims. Respondent, which freely dealt with the Government for its own advantage, has no reason for demanding that an exception be made in its behalf. For the Government, on the other hand, maintenance of the immunity bar in these cases is important in order to prevent undue judicial interference with "the ordinary duties of the executive departments," particularly those func-

tions relating to procurement and to property control, management, and disposal.

To bar this suit is not to leave the respondent without remedy; Congress has, in the Tucker Act, provided a means by which the respondent can be made whole. The substitution of this type of injunctive proceeding for a Tucker Act action deprives the United States of the latter's time and procedural provisions, with substantial detriment to the conduct of the Government's contract litigation, and without adequate protection against damage or loss flowing from unmerited injunction suits. Reasons akin to these have led Congress to limit consent to suits against the United States to claims for money only, both in the Tucker Act and in the recent Federal Tort Claims Act. This express policy should not be contravened by permitting suits for affirmative relief against the sovereign in the guise of actions against individual officials.

E. It is clear that the mandamus exception to the immunity rule is inapplicable here, since no ministerial or non-discretionary act is involved. The War Assets Administrator's authority and discretion under the Surplus Property Act are sufficiently broad to permit him, as the Government's contracting agent, to interpret the terms of the instant agreement and to determine what performance is called for, in the same way that the agent of a private corporation or business would be authorized to act. *Wells* v. *Roper*, 246

U. S. 335; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.

II

Even though the complaint be not dismissed as initiating an unconsented suit against the United States, it should be dismissed on the ground that respondent has an adequate remedy at law, in a suit for damages in the Court of Claims. For this reason, specific performance of a contract to deliver non-unique chattels, such as coal, will not be granted; and respondent's complaint nowhere alleges that the instant coal has any special or peculiar status, or that other coal would not have been equally satisfactory. The claim is now made in argument that surplus coal receives special export allocations not available to other coal, but the Department of Commerce informs us that, as a matter of law, this was not true during the period involved in this suit, and, indeed when the judgment of the trial court was entered. Moreover, respondent is in no position to demand equitable relief, since it resold the coal and its damages can be calculated from the terms of the resale contracts. In any event, the court of appeals plainly erred in holding, at the present stage of the litigation, that the coal is of such a "peculiar nature" as to warrant equitable relief, without giving the Government an opportunity to try that issue along with the others the court below directed to be tried.

III

On the merits of the transaction, respondent's case is without support. The complaint (including exhibits) discloses that respondent breached the agreement by refusing to deposit $17,500 in cash with the designated Dallas bank and by insisting on substituting payment by means of a letter-of-credit, which seriously disadvantaged the War Assets Administrator and did not comply with the contractual requirements. And, if it be material, it is likewise shown by the exhibits that under the conventional doctrines of sales law, title to the coal never passed to respondent. Title was not to pass before the coal was loaded on freight cars at Camp Maxey, as appears from the significant indicia of the parties' intention, *i. e.* insistence on cash payment at or before shipment; the inclusion of an f. o. b. shipping point term; and the distribution of risk so that the Government bore the risk until timely shipment and the purchaser thereafter. The use of the words "sale" or "contract of sale" in War Assets' standard Sales Memorandum follows normal, judicially recognized, use of those terms in a broad sense and does not indicate any intention that title was to pass immediately on consummation of the agreement.

ARGUMENT

I

THE COMPLAINT SHOULD BE DISMISSED AS MAINTAINING A SUIT AGAINST THE UNITED STATES TO WHICH IT HAS NOT CONSENTED

In the present climate of opinion, a plea by the Government to turn the respondent out of court for bringing an unconsented suit against the United States may initially seem distasteful. But in this case we have interposed and steadfastly maintained that defense because we believe it to be warranted by all the historically accepted rules and doctrines of sovereign immunity, sustained in this instance by the demands of the public interest, and confirmed by the general congressional legislation partially lifting the immunity bar. This is in essence a suit against a government official, in his official capacity, to compel specific performance of an ordinary sales agreement entered into by the United States. Such judicial compulsion on government officers to take affirmative action in the fields of government procurement and property disposal has consistently been denied by this Court, and for more than formal or historical reasons. And when Congress has permitted suits against the United States for demands arising out of the Government's procurement and distribution activity, as in the Tucker Act and the Federal Tort Claims Act, it has carefully limited its consent to actions for money dam-

ages. The field of government contractual relations is preeminently one, in our view, in which it is important that the bar of immunity be lifted no further than Congress has expressly authorized or this Court has traditionally sanctioned.

A. THE COMPLAINT ON ITS FACE DISCLOSES THAT RESPONDENT SEEKS SPECIFIC PERFORMANCE OF A CONTRACT WITH THE UNITED STATES

1. The history of this transaction, as revealed on the face of the complaint, shows that, in all but the defendant's name, the suit is one to compel specific performance by the United States of an agreement concerning the sale of certain government-owned coal to respondent.[13] The coal was admittedly the property, and in the possession, of the United States, which duly entered into a conventional contract for its disposition. Before removal of the coal from the Government's possession, a dispute arose as to respondent's compliance with the payment requirements

[13] In determining whether the suit is against the sovereign it is, of course, immaterial that the sovereign is not named as a party defendant. *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Poindexter* v. *Greenhow*, 114 U. S. 270, 287; *Hagood* v. *Southern*, 117 U. S. 52, 67; *In re Ayers*, 123 U. S. 443, 487–492; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Oregon* v. *Hitchcock*, 202 U. S. 60, 68–69; *Louisiana* v. *McAdoo*, 234 U. S. 627, 629; *Ex parte New York*, 256 U. S. 490, 500; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; *Ford Motor Co.* v. *Dept. of Treasury*, 323 U. S. 459, 464.

of the contract, and the Government refused delivery on the ground that respondent, having failed to fulfill its contractual obligation to make a single cash deposit in a Dallas bank, thereby breached the agreement. Respondent naturally contended that it had fully performed its undertakings, while the Government, for its part, claimed that respondent was in default and was not entitled to delivery. Asserting that damages would afford an insufficient remedy, the respondent then brought this action against the head of the government agency charged with the disposition of the coal, naming him solely in his official capacities and not as a private person (R. 1, 2);[14] the complaint contained no allegation that the War Assets Administrator, the defendant, had any personal knowledge of the transaction, nor was it charged that either he or his subordinates were acting beyond the scope of their statutory or constitutional authority. As if it were suing a recalcitrant private vendor for specific performance, respondent sought an injunction against sale or delivery of the coal to any other person, and against "cancellation of the sale to the plain-

[14] The War Assets Administration is an administrative unit of the United States, like a cabinet department, established to carry out the functions delegated to it by Congress and the President; it is not a corporation nor is it a legal entity separate from the United States; Congress has made neither it nor the Administrator suable. Cf. *United States Department of Agriculture* v. *Remund*, 330 U. S. 539, 541–542; see *supra*, fn. 3, p. 4.

tiff of this coal," as well as a declaratory decree that "the sale of this coal to the plaintiff * * * is still valid and in effect" and that "the purported sale to the Midland Coal Company is illegal" (R. 8–9). "An injunction against the breach of a contract is a negative decree of specific performance of the agreement" (*Shubert v. Woodward*, 167 Fed. 47, 53 (C. C. A. 8)),[15] and respondent's whole effort is plainly to compel the War Assets Administrator, as an official of the United States, to perform the United States' contract by officially ordering his subordinates to load the 10,000 tons of coal upon receipt of respondent's shipping orders,[16] and to accept pay-

[15] Cf. 5 Williston, *Contracts* (Rev. ed., 1937), Sec. 1445: "Injunction as a means of specific performance"; *In re Ayers*, 123 U. S. 443, 502–503 (equating a direct prayer for specific performance with a "bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract"); *Wells v. Roper*, 246 U. S. 335, 337 (treating a bill in equity for an injunction restraining the Postmaster General "from annulling a contract theretofore made between plaintiff and the Postmaster General acting for the United States, and from interfering between plaintiff and the United States in the proper performance and execution of the contract by plaintiff" as a forbidden suit "to oblige the United States to accept continued performance of plaintiff's contract").

[16] Respondent's complaint prayed (R. 9): "That, in view of the delay and disruption of arrangements caused by the purported cancellation, plaintiff shall have thirty days from the date of this Court's final order in which to give shipping instructions."

ment to the United States as proffered by respondent.

2. The court of appeals should have dismissed this action, as did the district court, under the settled rule, consistently announced by this Court and the lower courts over at least the past sixty-five years, which denies to federal courts jurisdiction to entertain proceedings seeking an injunction or a writ of mandamus directing specific enforcement of a contract made by the sovereign, though the complaint nominally may be against an individual public official. This is one rule which undeniably emerges as firmly established from the unclear state of the authorities in the field of sovereign immunity.[17] *Louisiana* v. *Jumel*, 107 U. S. 711, 721; *Hagood* v. *Southern*, 117 U. S. 52, 68; *In re Ayers*, 123 U. S. 443, 502–504; *United States ex rel. Levey* v. *Stockslager*, 129 U. S. 470, 478; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10–11; *Belknap* v. *Schild*, 161 U. S. 10, 18; *Tindal* v. *Wesley*, 167 U. S. 204, 219; *Ex parte Young*, 209 U. S. 123, 151–152; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642; *Goldberg* v. *Daniels*, 231 U. S. 218; *Wells* v. *Roper*, 246 U. S. 335; *Ex parte New York*, 256 U. S. 490, 500; *Goltra* v. *Weeks*, 271 U. S. 536, 546; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; *Land*

[17] Cf. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451; *Brooks* v. *Dewar*, 313 U. S. 354, 359; *Land* v. *Dollar*, 330 U. S. 731, 738 (on the difficulty of reconciling this Court's decisions in this field).

v. *Dollar*, 330 U. S. 731, 737; *United States ex rel. Shoshone Irr. Dist.* v. *Ickes*, 70 F. 2d 771 (App. D. C.), certiorari denied, 293 U. S. 571; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288, 290–292 (C. C. A. 2), certiorari denied, 293 U. S. 603; *Boeing Air Transport* v. *Farley*, 75 F. 2d 765, 768 (App. D. C.), certiorari denied *sub nom. Pacific Air Transport* v. *Farley*, 294 U. S. 728; *International Trading Corp.* v. *Edison*, 109 F. 2d 825 (App. D. C.), certiorari denied, 310 U. S. 652; *O'Harra* v. *Littlejohn*, 69 F. Supp. 274, 276 (D. D. C.). By the Tucker Act and the Federal Tort Claims Act, the United States has provided a forum which can award money damages against the Government for breach of contract and for certain types of tort, but, as these cases hold, the United States has not yet permitted itself to be sued for specific performance.

3. The gist of the rule applying the bar of sovereign immunity to actions such as this, and the reasons for the Court's constant reaffirmation of the principle, were shortly put in *Ex parte Young*, 209 U. S. 123, 151, where, speaking of state contracts, this Court said: "The things required to be done by the actual defendants were the very things which when done would constitute a performance of the alleged contract by the State. * * * A suit of such a nature was simply an attempt to make the State itself, through its officers, perform its alleged contract, by directing those officers to do acts which con-

stituted such performance. The State alone had any interest in the question, and a decree in favor of plaintiff would affect the treasury of the State." Similarly, the Court said, twenty years earlier: "* * * where the contract is between the individual and the State, no action will lie against the State, and any action founded upon it against defendants who are officers of the State, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the State, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the State, is in substance a suit against the State itself, and equally within the prohibition of the Constitution." *In re Ayers*, 123 U. S. 443, 504. Cf. Note, 41 Col. L. Rev. 1236, 1241. It is obvious that, in the case at bar, respondent seeks to compel petitioner to do "the very things which when done would constitute a performance" of the contract by the United States, and to forbid him from "the doing of those things which, if done, would be merely breaches of the contract" by the United States. And the complaint even more nakedly reveals its character as a claim against the United States by praying flatly for a decree that "the sale of this coal to the plaintiff"—a "sale" by the United States, if by anyone—"is still valid and in effect." See, *infra*, pp. 55–56.

4. Another way of disclosing the sovereign as the real party in interest, in such suits for specific performance, is to note that in order to secure relief the plaintiff must of necessity endow the defendant with official character, as respondent implicitly recognizes in the caption of the present suit (R. 1, 2). The defending official cannot comply with the court's decree as an individual or private person; he must act as a government official and within the scope of his official duties. Here, for instance, Mr. Larson would be required, if respondent were ultimately successful, to order his subordinates not to deliver the coal to the Midland Coal Company but to load it on freight cars at Camp Maxey, Texas, in accordance with respondent's shipping instructions, and to accept payment by means of the letter-of-credit method respondent has proposed. These actions he could take only in his official capacity as War Assets Administrator. It has always been held conclusive proof that a suit is against the sovereign when it is clear that the agent who is the nominal defendant can only comply with the judgment or decree in his official capacity.[18] *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 123–124; *Louisiana* v. *Jumel*, 107 U. S. 711, 720; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446,

[18] With the exception of suits for injunction or mandamus to compel the performance of purely ministerial acts, *e. g. Miguel* v. *McCarl*, 291 U. S. 442. We show below that this exception is inapplicable to the instant case. *Infra*, pp. 70–73.

453–454; *Hagood* v. *Southern,* 117 U. S. 52, 69; *In re Ayers,* 123 U. S. 443, 489; *New York Guaranty Company* v. *Steele,* 134 U. S. 230, 232; *Pennoyer* v. *McConnaughy,* 140 U. S. 116; *Belknap* v. *Schild,* 161 U. S. 10, 25; *Smith* v. *Reeves,* 178 U. S. 436, 439; *Naganab* v. *Hitchcock,* 202 U. S. 473, 475; *Wells* v. *Roper,* 246 U. S. 335, 337; *Ex parte New York,* 256 U. S. 490, 501; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 296; *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47, 50; *Ford Motor Co.* v. *Dept. of Treasury,* 323 U. S. 459, 463–464; *Haskins Bros. & Co.* v. *Morgenthau,* 85 F. 2d 677, 682–683 (App. D. C.), certiorari denied, 299 U. S. 588. The principle is analogous to that recently set forth in *Williams* v. *Fanning,* 332 U. S. 490, holding that a superior need not be joined in an action against his subordinate, where the judgment will expend itself on the subordinate alone and the superior will not be required to take new action, either directly or indirectly through his subordinate. Conversely, in an action such as this, the defending public official cannot satisfy the plaintiff as a private person but must take new action on behalf of, and as an agent of, the United States. The United States is therefore either the real party in interest or an indispensable party defendant, and since it has not consented to be brought to the bar the suit must fail.[19]

[19] In this connection, it is also significant that this is an equitable action and not one at law. For in *Cunningham* v. *Macon and Brunswick R. R. Co.,* 109 U. S. 446, the same

5. Respondent's answer to the argument that this is a forbidden suit for specific performance of a government contract appears to be threefold: First, that the action cannot be considered a suit for specific performance because, in respondent's view, title to the coal has clearly passed (Br. in Opp., pp. 13–14); second, that the rule barring specific performance of government contracts applies only to contracts for continuing performance of "sovereign functions such as carrying the mail" (Br. in Opp., pp. 19–20); and, third, that where the suit involves property the title to which has allegedly passed to the plaintiff, the principles of *United States* v. *Lee*, 106 U. S. 196, and *Land* v. *Dollar*, 330 U. S. 731, apply. The last limb of this argument we discuss in the succeeding section of this brief; the first two we may appropriately analyze at this point.

a. Nothing in the general law of contracts or of equitable remedies limits a purchaser's privilege to sue for specific performance to those cases in which the vendor admittedly still retains title. Where it is otherwise available, the remedy of specific performance can be applied

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bench which decided *United States* v. *Lee*, 106 U. S. 196, speaking exactly one year later through the same justice (Mr. Justice Miller), distinguished the *Lee* class of actions-at-law on the ground, *inter alia*, that "Courts of equity proceed upon different principles in regard to parties," and that in equitable suits the sovereign, which undeniably has a real interest in the controversy, must be treated as an indispensable party, in "equity and good conscience." 109 U. S. at 456–7.

whether or not title has passed; it can be, and usually is, employed to compel *delivery of the property,* regardless of the incidence of title at the time the suit is commenced, and not merely to compel "the transfer of *title* as promised in the contract to sell," as respondent would have it (Br. in Opp., p. 13; italics supplied). The Uniform Sales Act plainly makes the remedy available in any proper case "where the seller has broken a contract to *deliver* specific or ascertained goods," without restriction (as is the case with respect to other remedies) to instances where the property in the goods has passed to the buyer.[20] The comparable provision of the English Sale of Goods Act has been judicially interpreted to apply to "all cases where the goods are specific or ascertained, whether the property has passed to the buyer or not." *In re Wait* [1927] 1 Ch. 606, 617; *James Jones & Sons, Ltd.* v. *Earl of Tankerville* [1909] 2 Ch. 404, 445. And this conclusion has been expressly affirmed

[20] Section 68 of the Uniform Sales Act (D. C. Code, sec. 28–1506) provides:

> *Specific Performance.* Where the seller has broken a contract to deliver specific or ascertained goods, a court having the power of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just.

as to American law, upon the basis of a detailed study of the interrelations of specific performance and the Uniform Sales Act. Masterson, *Specific Performance of Contracts to Deliver Specific or Ascertained Goods under the English Sale of Goods Act and the American Sales Act* in *Legal Essays in Tribute to Orrin Kip McMurray* (Radin ed., 1935), pp. 439, 460–461. See, also, to similar effect, American Law Institute, *Restatement of Contracts*, Sec. 358, especially comment i; 2 Williston, *Sales* (2d ed. 1924), Secs. 601–602; 5 Williston, *Contracts* (Rev. ed. 1937), Sec. 1419-1419A; Note: *Specific performance, or injunction against breach, of contract for sale of tangible personal property*, 152 A. L. R. 4, especially 41–44. Moreover, respondent's own complaint belies its argument that it cannot be seeking specific performance since it already has title; in terms applicable only to an equitable action for specific performance, the complaint details the items of asserted irreparable damage (R. 7–8) and concludes that "therefore the plaintiff has no adequate or complete remedy at law" (R. 8); again, the prayer distinctly asks for a decree that "the sale of this coal to the plaintiff * * * is still valid and in effect" (R. 8) and for an *injunction* against the "carrying into effect the purported illegal and unauthorized cancellation of the sale to the plaintiff of this coal" (R. 8). See *supra*, p. 11. The court of appeals obviously treated the case as one for specific performance

since it held "the peculiar nature of the coal involved soundly bases appellant's resort to equity for relief" (R. 58–59); and a substantial share of respondent's argument in this Court has thus far been directed to sustaining that holding (Br. in Opp., pp. 27–28).

As long ago as 1913, in a similar suit against a public official for the equivalent of specific performance of a government contract, this Court held allegations of title to be immaterial. In the now classic case of *Goldberg* v. *Daniels*, 231 U. S. 218, the private plaintiff claimed ownership of the vessel in himself,[21] while the government official pleaded title in the United States; but this Court, without determining the issue of title, held that the suit must fail as one against the United States.[22] See also, *infra;* p. 39.

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[21] The petition for a writ of mandamus in *Goldberg* v. *Daniels*, *supra*, alleged (R. 4, No. 79, Oct. T. 1913): "13. And your petitioner claims that he is the true owner and entitled to immediate delivery of the possession of said cruiser *Boston* to him."

[22] Respondent correctly states (Br. in Opp., pp. 16–17), that the Secretary of the Navy's answer to the plaintiff's petition (*supra;* fn. 21) averred title in the United States, and that the plaintiff demurred to the answer; but respondent is incorrect in concluding that on that state of the record the title was admittedly in the Government. In view of the detailed pleading of the facts and circumstances, the Secretary's allegation of title was a conclusion of law which the plaintiff's demurrer did not admit (*Newport News Co.* v. *Schauffler*, 303 U. S. 54, 57; *Nortz* v. *United States*, 294 U. S. 317, 324–325; *St. Louis, Kennett & Southeastern Ry. Co.* v. *United States*, 267 U. S. 346, 348–349), and the court had before it the then equivalent of motions, by both parties,

b. Of course, the bar against specific performance of government contracts applies to more than agreements involving "continuing sovereign functions such as carrying the mail." (Br. in Opp., p. 20.) *Goldberg* v. *Daniels*—which this Court cited only two terms ago as exemplifying the rule (*Land* v. *Dollar*, 330 U. S. 731, 737)—itself involved the sale of a single surplus naval vessel, and the principle has never once been stated or applied (see cases cited, *supra*, pp. 28–29) as narrowly as respondent contends. The two cases which respondent cites for this argument (*Wells* v. *Roper*, 246 U. S. 335; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288 (C. C. A. 2)) do not rest on any peculiar "sovereign" character of the functions there involved, as distinguished from other federal activities, nor do they limit the rule to a particular segment of governmental functioning. The immunity's historical scope is undeniably as broad as the Government's authority. The reasons of policy for continuing to classify suits for specific performance against public officials as suits against the sovereign we discuss below (*infra*, pp. 63–70),

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for judgment on the pleadings; these motions rested on the undenied facts appearing in both petition and answer, rather than on the pleaders' differing conclusions. Cf. e. g. *Meyer* v. *Reif*, 217 Wis. 11, 12–13. The Court of Appeals for the District of Columbia resolved the issue of title in favor of the Government (*United States ex rel. Goldberg* v. *Meyer*, 37 App. D. C. 282) but this Court found it unnecessary to pass upon that question.

and they cover single sales of surplus property as well as continuing transactions. For the "essential nature and effect of the proceeding" in a case like this is such that the judgment sought by respondent would both "expend itself on the public * * * domain," and "interfere with the public administration." *Land* v. *Dollar*, 330 U. S. 731, 738.

B. THE RULE OF *UNITED STATES* V. *LEE* AND *LAND* V. *DOLLAR* IS INAPPLICABLE

Respondent's main argument is that *United States* v. *Lee*, 106 U. S. 196, and *Land* v. *Dollar*, 330 U. S. 731, wholly govern this case. In its view, these decisions hold that whenever the plaintiff *claims* a property interest in specific property (realty or personalty) in the possession of government officials, and *asserts* that the property is being withheld tortiously by the defendant officials, the suit is not one against the United States, at least until it is finally decided, after trial, that the United States has full title to and right to possession of the property. Neither case, however, announces or applies such a broad principle, which would arbitrarily single out claimed rights in tangible property for specially favored treatment, at the same time putting an end to a large part of the traditional governmental immunity from suits for specific performance, *supra*, pp. 28–30. We believe, rather, that the rule of these two cases rests on a complex of elements, absent in the case of an ordinary sale of govern-

ment property and of the normal suit for specific performance of a public contract, such as this.

1. *Specific performance excepted.*—In the first place, *Land* v. *Dollar* expressly distinguished an "attempt to get specific performance of a contract to deliver property of the United States" (330 U. S. at 737), and the *Goldberg* case, which the Court cited, was held an unconsented suit despite the complainant's express assertion of ownership of the property which was the subject of the alleged contract. *Supra,* p. 36. It has thus been made plain by this Court that the rule of the *Lee* and *Land* cases is inapplicable to attempts to get specific performance of government contracts, and that a plaintiff's assertion of ownership does not put the case within that rule.

2. *Officer exceeding authority.*—Secondly, it is settled that although an allegation that the officer is acting in excess of his statutory or constitutional authority may not be *sufficient* of itself to take the case beyond the immunity bar,[23] a sub-

[23] In the following decisions, for example, the courts have held the suit to be against the Government, although it was duly alleged that the officer's conduct was without authority in the Constitution or statute. *Louisiana* v. *Jumel*, 107 U. S. 711, 720–723; *Hagood* v. *Southern*, 117 U. S. 52, 67–68; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69–70; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475; *Louisiana* v. *Garfield*, 211 U. S. 70, 77–78; *Louisiana* v. *McAdoo*, 234 U. S. 627, 632–634; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 476; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Morrison* v. *Work*, 266 U. S. 481, 485–488; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; *Boeing Air Transport, Inc.* v. *Farley*, 75 F. 2d 765 (App.

stantial claim to that effect is a *necessary* condition precedent to maintaining an action against the public official. "Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred." *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21 (citing the *Lee* case, among others). See also *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 297; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620. The reason for this requirement is inherent in the constitutional immunity of the sovereign from unconsented suits and the theoretical foundation for permitting certain suits against public officials. If the officer were plainly acting within his proper authority, all his actions would automatically be official, and there could not even be a theoretical or fictional claim that he was being sued as a private person or that the sovereign had no interest in the action. See, *supra*, pp. 29–32, *infra*, pp. 47, 63.

In both *Lee* and *Land* the plaintiffs categorically averred that the defendants had exceeded their legal authority. In the former, the Court stated the basic inquiry to be to examine whether the defending officers' authority was "rightfully as-

D. C.), certiorari denied, 294 U. S. 728; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. 2d 288 (C. C. A. 2), certiorari denied, 293 U. S. 603.

sumed" and whether they were "lawfully possessed" of the authority they claimed (106 U. S. at 219). It was found that the Arlington estate was taken from plaintiff "by force and violence, and detained by the strong hand" (106 U. S. at 219), that the President and his subordinates had no lawful statutory or constitutional authority to take or hold the property (106 U. S. at 219–220), that the Secretary of War "had no more authority to make" the order by which the defendants justified their possession "than the humblest private citizen" (106 U. S. at 221), and that the plaintiff had been invalidly deprived of his property without due process of law (106 U. S. at 220–221).[24] Likewise, in the *Land* case, the plaintiffs alleged that the defendants were exceeding their statutory authority (330 U. S. at 734),[25] and the Court ac-

[24] The decisions which followed the *Lee* case similarly rest on findings or substantial allegations that the public official exceeded his valid authority:—*Tindal* v. *Wesley*, 167 U. S. 204, 222; *Scranton* v. *Wheeler*, 179 U. S. 141, 152; *Poindexter* v. *Greenhow*, 114 U. S. 270, 287–288; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620; *Goltra* v. *Weeks*, 271 U. S. 536, 544–546; *Ickes* v. *Fox*, 300 U. S. 82, 96–97; see *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21. These are all cases of alleged illegal tortious interference with the plaintiff's established property rights. See also *infra*, pp. 46, 54.

[25] The complaint alleged that "the contract between the plaintiffs and the United States Maritime Commission was unauthorized and prohibited by express provisions of the Merchant Marine Act of 1936, as amended," and that the defendants were "acting not only in excess of the powers validly conferred under the provisions of the Merchant Marine Act of 1936, as amended, but by actions which directly contravene the provisions of said Act" (R. 6, 7, No. 207, Oct. T. 1946).

cepted these allegations until they should be disproved at a trial. On the complaint, therefore, the defendants were "unlawfully" withholding the plaintiffs' shares (330 U. S. at 737), and could be said to have "become tort-feasors by exceeding the limits of their authority" (330 U. S. at 738); and the shares were "being wrongfully withheld by petitioners who acted in excess of their authority as public officers" (330 U. S. at 738).[26]

In the present case, on the other hand, the complaint nowhere alleges that petitioner's predecessor as War Assets Administrator stepped outside of his statutory or constitutional powers. The court of appeals does intimate (R. 58), however, that on respondent's version of the transaction, General Littlejohn (and presumably petitioner) exceeded his authority by refusing to require delivery of the coal. But we think that by this time it is settled that government contracting officials do not normally exceed their authority when they misconstrue the terms of an agreement and thus cause an actionable breach by the United States. Like any private corporation or large business enterprise, the Government must of necessity act through agents in making contracts; and the Government has the same right as a private business to entrust its agents with discretion and authority, so far as the principal is concerned, to

[26] In discussing the *Lee* opinion, the Court also stressed the invalidity of the authority of the defending public officials in that case. 330 U. S. at 736.

act upon disputed questions of contract interpretation. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–132. Here, the War Assets Administration, as the proper agency to dispose of the coal, was fully and specifically authorized by the Surplus Property Act to "dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper" and to "execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property * * *." *Supra*, p. 3. This plenary grant of power indicates that the Administrator's official authority respecting disposal contracts was not limited to a correct interpretation of the contractual terms; even when he erroneously construes a particular agreement and orders his subordinates to withhold surplus property in accordance with that misconstruction, he acts within the scope of his lawful authority as War Assets Administrator, exactly as does the president of a mail-order house when he refuses delivery of goods under a misinterpretation of the sales agreement. The refusal to deliver the coal was thus an authorized act; though it may have resulted in a breach by the United States of the sales contract for which the United States, the seller, might be held liable in the Court of Claims.

Cf. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, (1946) 59 Harv. L. Rev. 1060, 1075, quoted *infra*, p. 65.

Wells v. *Roper*, 246 U. S. 335, is square authority that a government official misconstruing a government contract does not thereby normally exceed his powers, and that the injured plaintiff must find his remedy in a suit against the other party to the contract, the United States. The Postmaster General decided to institute a new government-operated mail collection and delivery service and cancelled plaintiff's contract for the furnishing of automobiles and chauffeurs for use in mail collection and delivery, purporting to act under the cancellation clause of the contract. The plaintiff, regarding the cancellation clause as inapplicable, brought suit against the First Assistant Postmaster General for an injunction restraining the cancellation of the contract and "from interfering between plaintiff and the United States in the proper performance and execution of the contract by plaintiff" (246 U. S. at 335). In dismissing the suit as one against the United States, the Court pointed out (p. 337) that "the effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract * * *," and added (pp. 337–338):

> * * * The argument to the contrary assumes to treat defendant not as an official but as an individual who although

happening to hold public office was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. * * * It cannot successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of official discretion. *And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States* * * *

The United States has consented to be sued in the Court of Claims and in the District Courts upon claims of a certain class, and not otherwise. * * * [Italics supplied.] [27]

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[27] Similarly, a public official does not normally exceed his general authority when he commits a *tort* injurious to a private citizen's personal or property rights. Cf. *Ex parte New York*, 256 U. S. 490, 502 (damages caused by tugs operated by the State of New York); Federal Tort Claims Act, Sec. 410, 60 Stat. 842, 842–843, 28 U. S. C. 931 ("negligent or

3. *Private common-law tort.*—Another element, essential to the decision in *Lee* and *Land* but missing here, is the existence of private common-law tortious action by the defendant, if respondent's complaint be accepted on its face. The earlier case was an action of ejectment to secure the ouster of two individual trespassers who obtained possession of the property "by force and violence, and detained [it] by the strong hand" (106 U. S. at 219); and the relief prayed for, ejectment, could be granted if the defendants were regarded solely as private individuals. Cf. on the *Lee* case as a suit for a personal tort, *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446, 452; *In re Ayers*, 123 U. S. 443, 501–502; *Stanley* v. *Schwalby*, 147 U. S. 508, 518, 162 U. S. 255, 271–272.[28] In *Land*, the plaintiffs specifically alleged tortious invasion of their rights (R. 7, No. 207, Oct. 1, 1946), and the Court held their claim as pledgors to sound in tort and deemed the suit as one against private tort-feasors (330 U. S. at 736, 738).

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wrongful act or omission of any employee of the Government while acting within the scope of his office or employment * * *").

[28] The later cases in the *Lee* line also involved tort actions: *Poindexter* v. *Greenhow*, 114 U. S. 270 (detinue for personal property alleged to be improperly distrained by defendant for delinquent taxes); *Tindal* v. *Wesley*, 167 U. S. 204 (ejectment); *Scranton* v. *Wheeler*, 179 U. S. 141, 152 (ejectment); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (injunction to prevent trespass); *Goltra* v. *Weeks*, 271 U. S. 536 (same); *Ickes* v. *Fox*, 300 U. S. 82 (same).

Neither petitioner nor his predecessor can properly be sued as tort-feasors, regardless of their authority [29] and whatever the merits of respondent's claim to the coal. There has certainly been no personal misconduct on the part of either official; the complaint does not even allege or suggest that the original defendant, General Littlejohn, had any knowledge of the transaction prior to the filing of the complaint. Nor does the complaint appear to aver that either the United States or other officers of the War Assets Administration acted tortiously in invasion of respondent's rights.[30] But if a conversion of property did occur, as respondent now seems to argue (Br. in Opp., p. 19), the tort-feasor was the United States, the seller, and not petitioner or his predecessor who were the seller's principal officers. Cf. *Goldberg* v. *Daniels*, 231 U. S. 218. And if the subordinate officials who actually participated in the transaction are thought to be guilty of conversion,[31] it has been settled for a hundred years that

[29] Once it is admitted, as we think it must be, that petitioner and his predecessor have not exceeded their valid authority (*supra*, pp. 42–44), we think it is clear that *ipso facto* they cannot be sued as private tort-feasors.

[30] The complaint does no more than allege that "the officers of War Assets are acting illegally in purporting to sell coal to a third party which is the property of plaintiff" (R. 7). This allegation is entirely consistent with a purely contractual action without delictual overtones.

[31] There are at least three separate reasons for asserting that these subordinate officers and employees would not themselves be personally guilty of conversion even if respondent's contentions as to passage of title were wholly cor-

their superior (the War Assets Administrator) does not thereby become a tort-feasor and cannot be held liable for their wrongs. "A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties." *Robertson* v. *Sichel*, 127 U. S. 507, 515–516; see also *German Bank* v. *United States*, 148 U. S. 573, 579–580; *Malewicki* v. *Qvale*, 298 Fed. 301 (C. C. A. 8); *Zinkhan* v. *District of Columbia*, 271 Fed.

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rect. In the first place, they were acting within the scope of their authority and all their acts were therefore official (*supra*, pp. 42–45). Secondly, under the law of conversion, "failure to deliver what one has no power to deliver may be a breach of contract, but it is not a conversion" [Warren, *Trover and Conversion* (1936), pp. 37–44], and these officials would certainly have no power, *as private individuals*, to order the loading and delivery of the coal to respondent (see *supra*, pp. 31–32 and *infra*, pp. 50–51). Thirdly, a servant or employee should not be held liable as a converter for accepting his employer's claim of title and following his employer's directions to withhold possession; Professor Warren (*Trover and Conversion*, pp. 48–49) says that "this is a point not yet clear upon the authorities," but he is of the view that the better rule exonerates the servant or employee, following the old case of *Mires* v. *Solebay*, 2 Mod. 242, 244, 86 Eng. Reprints 1050, 1051; cf. *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18. Thus, if the seller here were a private corporation or business, it could be held liable for conversion if respondent were right, but not its employees who merely upheld its title; by like token, the United States might be a tort-feasor, but not its officers or employees in the War Assets Administration.

These reasons also apply, we might note, in the instance of Mr. Larson and General Littlejohn.

542 (App. D. C.); *Jones* v. *Kennedy*, 121 F. 2d 40, 44 (App. D. C.).[32]

Furthermore, even if General Littlejohn, as War Assets Administrator at the time respondent's alleged cause of action arose, could be held to have committed a conversion of the coal, the present petitioner does not stand in the same shoes. In actions to recover real property, as the *Lee* case, any defendant in possession may be regarded as a current trespasser; but as to personalty, there is only one trespass, the initial taking. When the property is turned over to another official, such as a successor in office, the latter's possession of, and interest in, the property can occur only by virtue of his official capacity. Cf. *Governor of Georgia* v. *Madrazo*, 1 Pet. 110.[33]

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[32] If respondent seeks to charge the War Assets Administrator with a tortious interference with its contract rights, *Wells* v. *Roper*, 246 U. S. 335, which involved a like charge, sufficiently shows that an accusation of this character cannot operate to remove the immunity bar. In addition, it is a general rule of tort law that an officer, agent, or employee of a contracting party, absent bad faith, cannot be held liable by the other contracting party for inducing or causing his employer or principal to breach the contract. *Greyhound Corp.* v. *Commercial Casualty Ins. Co.*, 259 App. Div. 317, 19 N. Y. Supp. (2d) 239 (1st Dept.), and cases cited.

[33] It is true that in *Osborn* v. *United States Bank*, 9 Wheat. 738, the Court gave judgment for possession of illegally collected tax monies against the treasurer of the state and his successor; but, in this aspect, the case has been restricted to the ground that the monies were originally turned over to the treasurer in violation of an order of injunction, so that the decree of restoration corrected the violation of the injunction. *Cunningham* v. *Macon & Brunswick R. R. Co.*,

He is not responsible for torts that his predecessor may have committed.

Finally, the error in characterizing the instant action, unlike the *Lee* and *Land* suits, as a private tort action against an official "stripped of his official character" by a wrongful invasion of the plaintiff's rights, is shown even more clearly by the type of relief which respondent requires. In *Lee,* the plaintiff could be entirely satisfied by personal eviction of the defendant officers from his land; in *Land,* as the Court held, the plaintiff's relief would merely compel the officials to hand over the documents representing the shares of stock in their possession. In both cases, the Court assumed the defendants could comply with the court's judgments as private individuals. In the present action, however, petitioner could only satisfy respondent by taking official action, *i. e.* by ordering his subordinates to load the 10,000 tons of coal in accordance with respondent's shipping instructions and to accept tender of payment in the form offered by respondent.[34] *Supra,* pp. 31–32.

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109 U. S. 446, 455. Because of the injunction, the monies were regarded as, in law, "kept out of the treasury." *Louisiana* v. *Jumel*, 107 U. S. 711, 725. Cf. *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 16.

[34] Even if this were a proper private action to enjoin an admitted private tort-feasor, it is highly doubtful that, as part of its relief in such action, the plaintiff could, without converting the suit into one for specific performance, require the defendant to undertake the burden of loading the 10,000 tons of coal as directed. Cf. *Farrar* v. *Rollins*, 37 Vt. 295; Prosser, *Handbook of the Law of Torts* (1941), p. 106

This is action he can take only as War Assets Administrator; as Mr. Jess Larson, private citizen, he could have no right to issue such orders and the employees of the War Assets Administration would not be privileged to obey them. The fiction that the official is being sued as a private tort-feasor must therefore collapse whenever, as here, the complainant demands something more than withdrawal from his property, and seeks to compel continuing affirmative action by a government agency.[35]

4. *Pre-existing substantial property interest.*— Still another fundamental component of the *Lee-Land* rule is the fact that, on the plaintiff's allegations, the property in question never belonged to the United States, and the plaintiff had both an established substantial interest in the property and possession of it before the United States acquired its asserted right. George Lee's claim of title to the Arlington estate was rooted in the early nineteenth century; his family had "long possession under that title" (106 U. S. at 199); and the place was admittedly his old "homestead" (106 U. S. at 219), which had been acquired during the Civil War by the United States at a tax sale. Petitioners in *Land* v. *Dollar* owned the common stock of Dollar of

[35] Compare the related argument, *supra*, pp. 31–32, that a suit is clearly one against the sovereign when the plaintiff must endow the defendant with official capacity in order to secure relief. See especially *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 16–17, and *Wells* v. *Roper*, 246 U. S. 335.

Delaware, an important American steamship line, for years prior to 1938, and their claim was that the stock "had only been pledged as collateral for a debt which had been paid" (330 U. S. at 734). If the allegations of the complaint were true, "the shares of stock never were property of the United States and are being wrongfully withheld by petitioners * * *" (330 U. S. at 738).

Few words suffice to note the wide gulf between the circumstances of these two cases and the present claim, at its most favorable aspect. The United States owned and possessed certain surplus coal which it desired to sell, as part of its general program of disposal of war surplus. Respondent entered into a conventional agreement for the purchase of this coal, to which the Government admittedly had title immediately prior to the sales agreement, and which has continued in the Government's possession. As respondent reads the sales agreement, proper offer of payment was made to the Government and title to the coal has now passed under the applicable doctrines of the law of sales, but the Government, which is of the opposite view, refuses delivery and retains possession. "The dominant interest of the sovereign" may well be "on the side of the victim"—like Lee or Dollar—whose own goods or realty, in the actual and not merely formal sense, have been unlawfully held or seized by public officials. Cf. *Land* v. *Dollar,* 330 U. S. at 738. But we think

that no such interest can weigh in the scales of a purchaser who has no more than technical and formal title to goods which he does not now have and has never possessed. Cf. *Goldberg* v. *Daniels*, 231 U. S. 218. Where the transaction is a normal sales arrangement, it is hard to see how the application of the immunity bar can properly turn upon the "purely conceptual notion" of "passage of title" (L. Hand, J., dissenting, in *In re Lakes' Laundry*, 79 F. 2d 326, 328 (C. C. A. 2)), thus presenting a forum for full determination of his claim to a purchaser who can use or misuse the nebulous and technical title doctrines of the law of sales to aver title in himself, while denying a trial and potential relief to the vendee whose agreement undeniably retains title in the sovereign.[36] Justice

[36] Professor K. N. Llewellyn, and others, have pointed out (1) the inadequacy and question-begging character of decisions adjudicating specific issues (*e. g.* who bears the risk at a particular time, whether seller can sue for the full price, etc.) on the basis of general determinations of the "location" of "title" in buyer or seller; (2) the inconsistency, confusion, and inadequacy of the rules purporting to aid such general determinations of the location of title, and of many decisions purporting to be based on those rules; and (3) the necessity of deciding the narrow issues actually presented for decision on the basis of relevant policy factors and in the light of the real factual setting. Cf. Llewellyn, *Cases and Materials on the Law of Sales* (1930), pp. 562–574; Llewellyn, *Through Title to Contract and a Bit Beyond* (1938) 15 N. Y. U. L. Q. Rev. 159, 165–175 ("The quarrel thus is, first, with the use of Title for purposes of decision as if the *location* of Title *were* determinable with certainty; and second, with the insistence on reaching for a single lump to solve all or most of the prob-

may require an opportunity to recover important property formerly possessed and enjoyed, which is now improperly withheld from the claimant by a government officer.[37] But neither justice nor

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lems between seller and buyer—and even in regard to third parties"; p. 166, italics in original); Llewellyn, *Across Sales on Horseback* (1939) 52 Harv. L. Rev. 725, 731–3, 736.

Here, respondent urges "title" as its sole key to a full trial and decision on the merits; but the policy considerations pertinent to the issue of sovereign immunity (see *infra*, pp. 63–70) are wholly different from those normally operative in private buyer-seller cases, and a determination that for certain buyer-seller purposes a buyer had "title" in the circumstances of this case should not be decisive of the separate issues involved in the defense of sovereign immunity. For that purpose, as we state above, the only question relevant to respondent's property interest is not technical title *vel non*, but whether respondent's interests are of "sufficient substance" to override the policies inherent in the sovereign immunity bar. Cf. *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 929–930 (C. C. A. 2), certiorari denied, 333 U. S. 873.

[37] In *Poindexter* v. *Greenhow*, 114 U. S. 270, 295 (detinue for desk distrained by defendant for allegedly delinquent taxes), the Court said: "Although the plaintiff below was nominally the actor, the action itself is purely defensive. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded." In the other cases similar to *Lee* and *Land* (*supra*, fn. 24, p. 41; fn. 28, p. 46), the claimant was also in possession and enjoyment of property at the time his rights were invaded or threatened by the public official. Indeed, in *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, which involved allegedly illegal regulatory activities of the Federal Government, there was no claim at all by the United States to the property; and in *Ickes* v. *Fox*, 300 U. S. 82, the plaintiffs admittedly owned and had long possessed the land to which the disputed water-rights were appurtenant, and had also long enjoyed the use of the water which the Government was seeking to cut off by alleged illegal and tortious actions.

history demand a like opportunity, in the absence of consent, to secure possession and use of government surplus property sold by the Government but undelivered for reasons deemed adequate by the surplus property officials.

5. Government's rights unaffected.—A final significant difference is that an adverse decision in the *Lee* and *Land* cases would not bind the United States or finally determine title to the property, while a victory for respondent would necessarily have those effects. An essential support of the two holdings on which respondent relies was the recognition, stressed by the Court, that the suit was for possession only (106 U. S. at 210, 219; 330 U. S. at 736–737, 739), and that the interest of the United States in the title could in no way be bound or affected by the judgment (106 U. S. at 217, 226; 330 U. S. at 736–737, 739). Where the plaintiff's chosen form of action against public officials did put in issue the sovereign's title, the Court unanimously held the suit to be "directly against the United States and against their property, and not merely against their officers." *Stanley* v. *Schwalby*, 162 U. S. 255, 271–272 (action of trespass to try title).[38]

[38] Cf. *Cunningham* v. *Macon and Brunswick R. R. Co.*, 109 U. S. 446, 456–7 in which Mr. Justice Miller pointed out, for the Court, that in equitable suits, as distinguished from actions at law such as the *Lee* case, a sovereign with a substantial interest in the controversy would be an indispensable party. See *supra*, pp. 32–33, fn. 19.

Respondent's complaint does more than demand possession of the coal from petitioner; it prays for an injunction against the "carrying into effect [of] the purported illegal and unauthorized cancellation of the sale to the plaintiff of this coal" (R. 8), and for declarations (1) that "the sale of this coal to the plaintiff by letter of War Assets Administration, dated March 19, 1947, is still valid and in effect" (R. 8), and (2) "that the purported sale to the Midland Coal Company is illegal, because title to this coal is in the plaintiff" (R. 9). These prayers necessarily require direct determination of the status and meaning of the Government's contract with plaintiff, and a choice between the United States and respondent as present owner of the coal. And these determinations of the Government's interest are not to be made solely as intermediate steps in a judgment on respondent's right of possession as against petitioner, but as final decrees declaring and adjudging the rights of the United States. This is precisely what respondent cannot do without impleading the United States in the proper forum.[39]

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[39] In *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, 374–375, the Court's pertinent answer to a plaintiff who, like respondent, asserted that it had directed its action solely against the individual public official was as follows:

> * * * The sole purpose of this proceeding is to prevent the Secretary from taking certain action which would stop payment by the government of money law-

To sum up the reasons why the *Lee* and *Land* doctrine is inapplicable to the normal disposition of government property through conventional sales agreements: That rule expressly does not apply to an "attempt to get specific performance of a contract to deliver property of the United States"; moreover, it requires *first*, a substantial claim that the public official has exceeded his statutory or constitutional authority; *second*, a cause of action indicating that, if the respondent's factual allegations are true, the defending official has committed a private tort invading the plaintiff's rights, for which the plaintiff can secure the relief he demands without invoking the defendant's official capacity; *third*, a substantial

fully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant. The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented. The underlying basis for the relief asked is the alleged unconstitutionality of the Renegotiation Act and the sole purpose of the proceeding is to fix the government's and not the Secretary's liability. Thus, though appellant denies it, the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. * * *

And a prayer for a declaratory judgment, asking only that the Renegotiation Act be held unconstitutional, was expressly adduced as showing that the purpose of the suit was to have that Act, which concerned government contracts, declared unconstitutional, 326 U. S. at 375, fn. 4.

claim to a real (and not a formal) interest in the property, and actual enjoyment of it, antedating the transaction or events by which the plaintiff's rights were allegedly invaded; and *fourth,* the form of action, as well as the relief requested, must not require a determination of the rights, title, or interest of the sovereign, as distinguished from the individual defendant. We believe we have shown that on *each* of these counts the respondent's complaint fails to fall within the *Lee-Land* exception to the sovereign immunity doctrine: (1) The action is plainly one for specific performance, (*supra,* pp. 25–38); (2) neither petitioner nor his predecessor has breached his statutory or constitutional powers, and the complaint does not even allege that they have done so; (3) respondent does not, and cannot, charge General Littlejohn or petitioner with committing a private individual tort, and the relief sought necessarily requires official action; (4) the coal has long been the Government's and respondent, which has never possessed the property, can only claim, at best, under the technical sales law doctrines of passage of title; and (5) respondent's complaint plainly seeks a direct declaration as to the validity, status, and meaning of a government contract and a determination of the Government's title to the coal. Certainly, respondent can-

not show compliance, as it must, with *all* the requirements of the *Lee-Land* authorities.

C. THE SUIT IS ONE TO TRY TITLE TO AND RIGHT TO POSSESSION OF PROPERTY TO WHICH THE UNITED STATES ASSERTS FULL CLAIM

We have pointed out that the complaint reveals this suit to be one to compel specific performance of a government contract concerning the sale of government-owned coal. *Supra*, pp. 25–38. Since the subject of the contract is property which the United States claims as its own, an alternative way to view the action is as one to try the title to and right to possession of this property.

1. Except perhaps for cases which can be brought within the *Lee* rule, *supra*, pp. 38–59, a suit directly involving the use, possession, or title of property in which the Government claims an interest is a suit against the sovereign. *Carr* v. *United States*, 98 U. S. 433, 437–438; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Christian* v. *Atlantic & N. C. R. R. Co.*, 133 U. S. 233; *Belknap* v. *Schild*, 161 U. S. 10; *Stanley* v. *Schwalby*, 162 U. S. 255, 270, 272; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386–387; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69–70; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475–476; *Louisiana* v. *Garfield*, 211 U. S. 70, 77–78; *Hopkins* v. *Clemson College*, 221 U. S. 636, 648–649; *Goldberg* v. *Daniels*, 231 U. S. 218; *Lankford* v. *Platte Iron Works*, 235 U. S. 461; *New Mexico* v. *Lane*, 243

U. S. 52, 58; *Morrison* v. *Work*, 266 U. S. 481, 485–486; *Leather* v. *White*, 266 U. S. 592, affirming 296 Fed. 477 (C. C. A. 7); *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 118; *Minnesota* v. *United States*, 305 U. S. 382, 386.

This rule is applicable not only where the United States' title or possessory right is conceded, but in every case where its claim is not merely colorable. *Louisiana* v. *Garfield, supra; Morrison* v. *Work, supra; Stanley* v. *Schwalby, supra; Oregon* v. *Hitchcock, supra; Naganab* v. *Hitchcock, supra; Goldberg* v. *Daniels, supra; New Mexico* v. *Lane, supra; Leather* v. *White, supra.* In the *Garfield* case, the state filed a bill against the Secretary of the Interior and the Commissioner of the General Land Office to establish its title to certain lands claimed under the swampland acts. In response to a demurrer, lodged on the ground that the suit was against the United States, Louisiana argued (211 U. S. at 72–73);

> According to the theory of the present bill, the title to the lands here in controversy has by conveyance not only passed out of the United States into the State of Louisiana, but by reason of a certain congressional statute of limitation and repose the title so conveyed is no longer subject to attack or suit by or on behalf of the Federal Government, and, therefore, the United States is not, and cannot be made, the real party defendant, for the all-sufficient reason that the United States has no present,

> prospective or ultimate interest in the land whatsoever. If, therefore, the court shall find that the legal title to the lands in dispute has passed out of the United States into the State of Louisiana, then there cannot be any doubt of the jurisdiction of this court to entertain the suit.

In dismissing the bill for want of jurisdiction, the Court refused to let jurisdiction depend upon the complainant's allegations of title. Mr. Justice Holmes, for the Court, first assumed "for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit" (211 U. S. at 75). He then briefly reviewed the state's arguments that it had good title to the land, stated that at least the case was doubtful, and concluded:

> But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. (211 U. S. at 77).

Thus, it was definitely held that although on the theory and allegations of the bill the United States had no interest, nevertheless the United States' claim was at least substantial and the suit would have to fail at its very outset. The same ruling was rendered in *New Mexico* v. *Lane, supra,* at 58, where the state asserted full title to certain lands formerly part of the public domain, and the United States controverted that claim. In the *Stanley* case, *supra,* where the private plaintiffs and the defending officials engaged in a spirited

dispute as to title to the land, the Court first held, without determining the merits, that the suit was against the United States and its property, and then "with a view to the ultimate determination of the case" (162 U. S. at 272), it upheld the Government's claim on the merits. See, also, *Morrison* v. *Work, supra; Goldberg* v. *Daniels, supra.*[40]

The present case involves a dispute as to title to and possession of coal at Camp Maxey, Texas. Both respondent and the United States claim title and the right to possession, and the Government's claim is at least substantial and not merely colorable. See Point III, *infra,* pp. 79–94. The controversy thus "raises questions of law and of fact upon which the United States would have to be heard," and its liability "cannot be tried behind its back." *Louisiana* v. *Garfield,* 211 U. S. 70, 77, 78.

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[40] In the *Morrison* case, the Court dismissed a suit to enjoin the Secretary of the Interior from carrying out certain acts of Congress upon the ground that they unconstitutionally deprived the plaintiff and other members of the Indian tribe of property held by the United States for them as individuals. It was admitted that the acts were valid as to tribal property, which the United States claimed the property to be. The Court said that the claim of the United States that the property was tribal was at least a substantial one; that interference with its disposition of the lands by enjoining its officials would interfere with the performance of governmental functions, and vitally affect interests of the United States, and that hence the United States was an indispensable party (266 U. S. at 485–486).

For discussion of *Goldberg* v. *Daniels*, which is also pertinent to this point, see *supra*, pp. 36, 39.

2. The principle that a substantial governmental claim to the property is an initial barrier to any suit for title or possession may not apply when the *Lee* doctrine properly fits the case. We have shown, however, that respondent's complaint does not come within that class. *Supra,* pp. 38–59. For this phase of our argument, we may even go further and concede that the principle we urge immediately above is inapplicable to certain cases which do not squarely fit all the requirements of the *Lee-Land* rule, as we read it. But we think that one indispensable prerequisite of any suit against a public official testing the title or possession of government-claimed property is that the defendant official be fairly charged with exceeding his valid authority. That is the irreducible minimum of all the cases permitting such suits against an official. See *Yearsley* v. *W. A. Ross Construction Co.,* 309 U. S. 18, 21; and *supra,* pp. 39–40, 47. There is no escaping the basic principle that when an officer acts within his powers all that he does is official and Government-oriented. Here, as we have already shown, respondent does not, and cannot properly charge petitioner or his predecessor with any action beyond his statutory or constitutional authority. *Supra,* pp. 42–45.

IF THE JUDGMENT SOUGHT BY RESPONDENT WOULD EXPEND ITSELF ON THE PUBLIC DOMAIN AND INTERFERE WITH THE PUBLIC ADMINISTRATION

Thus far, our argument has been mainly concerned with the traditional conceptions and doc-

trines, as well as the authoritative decisions, in that murky zone which is sovereign immunity. We have tried to show that this case is governed by established principles at the solid center and not by disputed rules at the periphery. It is our belief that the court of appeals' decision silently denies these long-settled principles, and casts away an important segment, hitherto unquestioned, of the historically accepted doctrines. But we do not rest solely on precedent, or history, or established principles. Threading our argument have been governmental considerations which we should now like to draw together.

1. Sovereign immunity does not stand in high repute with many jurists and lawyers, but the conception is imbedded in the Constitution and continues to be largely accepted by Congress and the state legislatures which have power to abolish the privilege, and therefore it must still be given its due place. It can have no more justified application than in the field of normal government contractual relations. For there the private party is a voluntary participant in a consensual transaction, which is generally commercial in character, and at the outset he knows both that he is dealing with the privileged Government,[41] and that Congress has limited his remedies to a suit for money damages under the Tucker Act. He is therefore

[41] Cf. *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States*, 254 U. S. 141, 143; *Federal Crop Insurance Corporation* v. *Merrill*, 332 U. S. 380.

not without some remedy, and as a voluntary actor cannot rightly complain that other remedies, available against private contractors, are not open. Nor in these cases do there exist the coercive elements—abuse of governmental regulatory power, abrupt seizure of truly private property, actual "invasion" of substantial rights—which, under our theory of government, suggest that the suit may justly be regarded as one against the officer as an individual.[42]

Respondent forgets that it freely entered into this transaction with the United States, fully aware of the status of its opposite number. It seeks to envelop the case with the aura of *in invitum* interference with substantial property rights which characterized *United States* v. *Lee* and was alleged to exist in *Land* v. *Dollar*. But the sole property right it can claim is the alleged

[42] Cf. Block, *Suits Against Government Officers and the Soverign Immunity Doctrine* (1946), 59 Harv. L. Rev. 1060, 1075:

> On the other hand, when the breach of contract is not occasioned by such conduct [i. e. "official action pursuant to an unconstitutional statute or in excess of statutory authority"], but arises, for example, from a discretionary act of the official or from a difference of opinion as to the interpretation of the terms of the contract, then the underlying policy of the sovereign immunity doctrine to prevent undue interference with the operations of government should be afforded full protection and the suit barred for lack of jurisdiction. In this latter type of case, unlike the former situation, the plaintiff has no interest which outweighs the reason for applying the sovereign immunity doctrine.

technical title stemming from its contract, and, as we have already suggested, (*supra,* pp. 52–55), this type of formal property interest should not be a sufficient lever to move the case from the consensual-commercial domain, in which the Tucker Act alone controls, to the coercive area in which the private party may fairly be viewed as the victim of a wrongful invasion of his rights of property. Cf. *Land* v. *Dollar,* 330 U. S. at 738. If respondent is to have the opportunity to secure specific performance of its government contract, simply because that agreement concerns a disposition of government property and thus permits an allegation of passage-of-title, while contractors with other types of agreements continue to be barred by the established immunity rule, an additional remedy will be created for one class of public contractors which will be without warrant in the realities of government contracting. In the area of government procurement and distribution, traditional doctrines should not be discarded to make such an eccentric exception.

2. For the Government, maintenance of the immunity bar in cases arising from contractual transactions serves important practical ends. In *Land,* the Court referred to the "practical considerations reflected in the policy which forbids suits against the sovereign without its consent" (330 U. S. at 738), and there, as well as in *Williams* v. *Fanning,* 332 U. S. 490, the opinion

laid down a general practical test which would designate this suit as one against the United States. The "essential nature and effect of the proceeding" are such that the judgment sought by respondent would both "expend itself on the public * * * domain," and "interfere with the public administration." 330 U. S. at 738. Coal forming part of the United States' surplus stores, and in its custody, would be abruptly transferred out of its hands by court order, and government officials would be required to load and deliver the coal to respondent's order. Under the decision below, disposal of such government surplus can be, and in this case has been, stopped completely by temporary restraining orders or injunctions, and to that extent the aim of the Surplus Property Act of 1944 (Sec. 2 (m), 50 U. S. C., App. 1611 (m) (r)) to foster speedy disposition of these assets is frustrated.[43] And the only protection afforded the United States has been an injunction bond of $1,000 (R. 50) (see *supra,* fn. 11, p. 13), which will obviously be inadequate to permit recoupment of damages suffered, if the Government should finally prevail.

If the court of appeals' holding were to be applied to purchase and other non-sales cases in

[43] Even if restraining orders, injunctions, or stays are not issued, the mere pendency of the action may well prevent disposition of the property to the prejudice of efficient administration. Cf. *Jones* v. *Securities & Exchange Comm.*, 298 U. S. 1, 17–18.

which the ingenuity of contractor's counsel can find reason for alleging a property interest,[*] the result will be similar prolonged interference with the administration of government property which would be even more serious. Such affirmative judicial intervention in governmental affairs runs counter to the repeated admonition that "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief * * *." *Decatur* v. *Paulding*, 14 Pet. 497, 516; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131–2. In the field of sovereign immunity, that basic principle operates to compel the designation of an action for a judgment which would interfere with the public administration as a barred suit against the Government.

Moreover, the substitution of this type of injunctive proceeding for a statutory action under the Tucker Act deprives the United States of the latter's time and procedural provisions, with substantial detriment to the conduct of the Government's contract litigation. The schedule in the

[*] *E. g.*, purchases by the United States in which delivery substantially precedes payment, as it usually does, and the private seller claims a property interest in the goods until final payment.

It is also pertinent to note that recent district court cases have sought to compel delivery to private parties of government property by alleging lesser property interests than full "title," *e. g. Palmer Bolt & Nut Co., Inc.* v. *Littlejohn*, 75 Wash. L. Rep. 725 (D. D. C.) ("equitable property interest and lien").

instant case will serve as an illustration. The contract for the sale of the coal was cancelled on April 16, 1947 (R. 5, 29). Yet by April 29, 1947, before the Department of Justice was apprised of a controversy, an *ex parte* restraining order had been obtained (R. 35–36), and a notice of motion for a preliminary injunction was made returnable on May 6, 1947 (R. 36). The procedure evolved by Congress and this Court allows the United States sixty days after service upon the United States Attorney for answer in District Court Tucker Act suits (28 U. S. C. [1946 ed.] 763), and a similar period under the Federal Rules of Civil Procedure for suits against the United States, its officers, and agencies (F. R. C. P., Rule 12 (a)).[45] These relatively lengthy periods are established in order that the necessary reports may be obtained, and that the Government's law officers may familiarize themselves with the facts before answering. Under the sixty-day rule, the Government would have had until June 28, 1947 for answer. Fifty days before that date (*i. e.* May 9, 1947 (R. 50)) an appeal to the court of appeals had already been taken by respondent. The speedy pace of an injunction suit is at complete variance with the procedural protections with which Congress and the courts have clothed the United States as defending party in contract litigation.

[45] Rule 19 of the Rules of the Court of Claims allows forty days for demurrer, plea, or answer.

Congress has long recognized contract claims against the United States, and has provided a judicial forum for their determination in the Court of Claims and the district courts, but it has never authorized the affirmative relief which respondent demands. Recently, Congress recognized a large class of tort claims against the sovereign, and provided the district courts as the forum, but it was careful to provide that the claim could be *"for money only."* Federal Tort Claims Act, Sec. 410 (a) (28 U. S. C. [1946 ed.] 931 (a)). These legislative consents-to-suit indicate the consistent congressional policy, in contract as well as in tort, against relief other than damages. This express policy, reflecting the needs of public administration, properly bears much weight, we believe, in deciding whether the instant suit for affirmative relief against a government official should be viewed as tantamount to an unconsented suit against the United States.

E. MANDAMUS WILL NOT LIE SINCE NO MINISTERIAL AND NON-DISCRETIONARY ACT IS INVOLVED

Some argument is offered that mandamus or a mandatory injunction will lie here because "the duty to load the coal when and if asked or directed would be purely a ministerial one" (Br. in Opp., pp. 14, 21). This argument could only prevail if respondent were to show that petitioner and his predecessor had no discretion to construe the contract as they did and were compelled to follow respondent's views. We have already

pointed out that neither General Littlejohn nor Mr. Larson could be said to be exceeding his valid *authority* even if respondent's reading of the contract were correct (*supra*, pp. 42–45). The same reasons attest the War Assets Administrator's full *discretion* in the matter. Respondent does not, and cannot, assert a violation of any statutory provision compelling the action it demands (cf. *Houston* v. *Ormes*, 252 U. S. 469; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, 374), and the War Assets Administrator's broad statutory authority to dispose of surplus property (*supra*, pp. 3–4) endows him with sufficient discretion to take whatever action he deems desirable in entering upon and performing contracts. Nor was this discretion exhausted "at the time the contract with appellant [respondent] was entered into" (R. 58), as the court of appeals said. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127, certainly indicates that the agents of the United States have as much internal discretion as those of a private contractor to determine what performance was called for. *Wells* v. *Roper*, 246 U. S. 335, 337–338 (*supra*, pp. 44–45), expressly holds that a government contracting official exercises discretionary and non-ministerial authority in construing a government contract, even though it be assumed "that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States." See, *supra*, p. 45.

And, if it be material, it is undeniable that War Assets' position in the dispute between the parties over the terms of payment was, at the least, a substantial one. (Cf. Point III, *infra.*) In these circumstances, respondent is a far cry from proving the plainly ministerial and non-discretionary duty to read the contract in the way it desires, which is an indispensable prerequisite to mandamus or a mandatory injunction. Cf. *Brashear* v. *Mason,* 6 How. 92, 102; *International Contracting Co.* v. *Lamont,* 155 U. S. 303; *Goldberg* v. *Daniels,* 231 U. S. 218; *Work* v. *Rives,* 267 U. S. 175; *Wilbur* v. *United States,* 281 U. S. 206, 218–219; Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine* (1946), 59 Harv. L. Rev. 1060, 1075 (quoted *supra,* p. 65).

It is no answer to say that a full trial will show respondent's construction of the contract to be correct. The issue is not the error or accuracy of the War Assets' interpretation, but the discretion reposed in its officials to make that construction. Exactly a century ago, this Court punctured a similar argument: "It will not do to say, that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for, upon this ground, any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding

by mandamus would become as common, in the enforcement of demands upon the government, as the action of assumpsit to enforce like demands against individuals." *Brashear v. Mason*, 6 How. 92, 102.

In sum, the instant suit has all the characteristics of an action in which the United States alone is the real party in interest, and in which the defending public official cannot properly be sued, and for those reasons the complaint should be dismissed as maintaining an unconsented suit against the United States.

II

THE DISTRICT COURT DOES NOT HAVE EQUITABLE JURISDICTION TO GRANT SPECIFIC PERFORMANCE SINCE RESPONDENT HAS AN ADEQUATE REMEDY AT LAW

A. A SUIT FOR DAMAGES IN THE COURT OF CLAIMS IS AN ADEQUATE REMEDY

Even if the complaint should not be dismissed as initiating an unconsented suit against the United States, we believe that equity jurisprudence requires its dismissal on the ground that respondent has an adequate remedy at law. Under Section 267 of the Judicial Code, 28 U. S. C. 384, as well as the established equity rule, United States courts may not sustain an equity action "where a plain, adequate and complete remedy may be had at law." Applied to a suit for specific performance, this principle requires an equity

court normally to refrain from ordering the transfer or delivery of non-unique chattels purchasable in the market. 5 Williston, *Contracts* (rev. ed. 1937), sec. 1419-1419A; 4 Pomeroy, *Treastise on Equity Jurisprudence* (5th ed.), sec. 1402. *Coal* has frequently been held such ordinary non-unique goods, and contracts for its purchase not specifically enforceable. *Consolidated Fuel Co.* v. *St. Louis Southwestern Ry. Co.*, 250 Fed. 395 (C. C. A. 8); *Black Diamond Coal Mining Co.* v. *Jones Coal Co.*, 200 Ala. 276; *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630; *George E. Warren Co.* v. *A. L. Black Coal Co.*, 85 W. Va. 684; *Pollard* v. *Clayton*, 1 K. & J. 462, 69 Eng. Reprints 540; *Falcke* v. *Gray*, 4 Drew. 651, 657–658, 62 Eng. Reprints 250, 252; *Fothergill* v. *Rowland*, L. R. 17 Eq. 132.

Respondent's complaint nowhere asserts any unique or special quality in these 10,000 tons of coal. It rests its call upon equity solely on (1) loss of standing in the trade; (2) loss of profits and liability in damages to its repurchaser, Penn-Pocahontas; and (3) impossibility of ascertaining such profits or liability (R. 8). But each of these items of alleged irreparable damage could be avoided by outside purchase of coal, even at a higher price, and a subsequent suit against the United States in the Court of Claims for any difference. The complaint does not allege that other coal could not be secured, or that respondent could

not fulfill its repurchase agreements with other coal. Respondent's unwillingness to take that course presents no reason for the intervention of equity, for if that course had been followed, respondent's damages, if any, could have been measured in money terms, and would be plainly ascertainable. Cf. *Texas & Pacific Ry. Co.* v. *Marshall*, 136 U. S. 393, 405; *Boston Wool Trade Ass'n.* v. *Snyder*, 161 F. 2d 648, 649 (App. D. C.); *Consolidated Fuel Co.* v. *St. Louis Southwestern Ry. Co.*, 250 Fed. 395, 398–399 (C. C. A. 8).

We have noted that the complaint neither asserts any unique quality in the coal, nor alleges that satisfactory coal cannot be secured on the open market or elsewhere. In its argument, however, respondent has stated that this coal is unique because, being surplus, it can receive special allocations for export not available to newly-mined coal, and that respondent intended its purchase to be for export (Br. in Opp., pp. 27–28). This contention as to the special status of the coal does not appear in the complaint or even in the affidavits filed on behalf of respondent (R. 33–34, 53–54).[46] In any case, we are advised by the

[46] The only possible reference in the complaint bearing on this claim is the portion of the fourth paragraph partially quoted in respondent's Brief in Opposition, p. 27. ("Upon entering into these contracts the plaintiff applied for special railroad rates to Texas ports which were granted and for special export licenses outside the regular export allocation system of the U. S. government for newly mined coal, which were granted" (R. 2)). But this allegation wholly relates to

Office of International Trade, of the Department of Commerce, that prior to September 1, 1947, during the period involved in this suit and when the judgment of the trial court was entered, export licenses were required for the exportation of all coal exceeding $100.00 in value, and that in granting such export licenses no distinction was made between coal originating through the War Assets Administration, newly-mined coal, or other coal originating from private sources.[47] There was, therefore, no basis for any claim of uniqueness; newly-mined coal or other nonsurplus coal would have been granted export licenses on the same basis.

But even if this coal were concededly unique, respondent would be in no position to demand equitable relief. It resold the coal to the Penn-Pocahontas Coal Company, and the repurchaser resold to an agency of the Portuguese Government on terms which the complaint sets forth (R. 7). Respondent's loss of profits, as well as its potential liability to its repurchasers, could be adequately calculated from the stated terms of the

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prior coal contracts, entered into and performed in 1946, and not at all to the instant transaction. There is no similar allegation or reference relating to the instant coal.

[47] The Office of International Trade also states that, during this period, it licensed freely the export of coal in excess of the quantities generally allocated for export where the exportation would throw no additional burden on ports having mechanical loading facilities, and that, therefore, such licenses were freely granted for the export of coal through Gulf ports which did not have mechanical loading facilities.

resale to Penn-Pocahontas and the further resale to the Portuguese Government. Indeed, respondent expressly sets forth figures from which its damages could be calculated as easily as in most actions at law (R. 7). The loose claim that "its standing with the trade and with the Penn Pocahontas Coal Company will be lost" (R. 8), an assertion hardly unique to the present case, is not an item of contract damages normally cognizable in the courts (cf. *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540), and should not move an equity court to use the extraordinary remedy of specific performance.

Considerations of policy and practicality similar to those we have set forth in our sovereign immunity argument (*supra*, pp. 63–70) urge the most cautious use of affirmative equitable remedies against the Government, even in cases in which the plaintiff could obtain such relief against a private defendant. "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury." *Hurley* v. *Kincaid*, 285 U. S. 95, 104; cf. *Harrisonville* v. *Dickey Clay Mfg. Co.*, 289 U. S. 334, 338.

B. IN ANY EVENT, THE COURT OF APPEALS ERRED IN HOLDING THAT THE COAL INVOLVED IS OF SUCH A "PECULIAR NATURE" AS TO WARRANT EQUITABLE RELIEF

This case was before the court of appeals on respondent's appeal from the district court's dismissal of its complaint and denial of a preliminary injunction on the ground that the suit was an unwarranted one against the United States. The record contained the complaint, motions, and some affidavits, but no evidence had been taken, and no findings of fact had been made by the lower court. As we have pointed out above (*supra*, pp. 74–76), neither complaint nor affidavits ever alleged any unique or peculiar quality in the coal and there had been no trial of that issue in the district court. The court of appeals held that respondent was entitled to a full hearing and a trial on the merits of its claims that it had properly performed its part of the contract and that title had passed to it. But the court went out of its way to deny the Government a full hearing and trial on the issue of the "peculiar nature" of the coal by stating flatly in its opinion, without benefit of any evidence or findings on the point, that if respondent's substantive claims were upheld, "the peculiar nature of the coal involved soundly bases appellant's [respondent's] resort to equity for relief" (R. 58), and by accepting fully all of respondent's contentions to this effect, even though the issue is a factual one which had never been properly mooted. As a matter of plain fact, the court of appeals was in error in its statements

as to the special status of "surplus" coal (*supra*, pp. 75–76), and at the very least the petitioner should be entitled, if the case is remanded for a trial on the merits, to show that this coal has no "peculiar nature" warranting equitable relief. The court of appeals cannot foreclose that right by a gratuitous holding on an issue which it could not properly decide for itself at that stage of the litigation.

III

RESPONDENT BREACHED ITS CONTRACT, AND, IN ANY EVENT, TITLE HAS NOT PASSED

Our entire argument as to sovereign immunity (Point I, *supra*) and as to equitable jurisdiction (Point II, *supra*), rests on the immateriality of respondent's substantive claims that title has passed to it and that it duly performed its share of the contract. We believe that on both points it makes no difference whether respondent is right or wrong, whether title is now actually in the United States or in respondent, or whether respondent or the United States breached the contract. As for Point I, these are all issues on which the United States is entitled to be heard, and on which it cannot be heard in this forum; and, of course, respondent could not in any event claim specific performance (Point II) until it had proved itself right on all these issues. But on both points it may be material to show that the Government's defense on the merits is not frivo-

lous or merely colorable, but has substance (see *supra*, pp. 60–62); and it is in that connection, and for that purpose, that we undertake to show the error of respondent's substantive contentions.

A. RESPONDENT BREACHED ITS CONTRACT

1. Respondent's agreement, as spread on the face of the complaint and exhibits, plainly required it to place $17,500 in the Dallas bank, to assure payment to War Assets Administration on the submission of invoices. Respondent's offer stated that "contract shall be on *cash* basis based on railroad scale weights as heretofore and payment made upon presentation of your invoices to same bank in Dallas" (R. 12; italics supplied). War Assets' letter of acceptance stated that "your terms of placing $17,500.00 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank are accepted" (R. 13), and added that "it may be to your advantage to deposit the $17,500 with this office for deductions from the amount as shipments are made until this sum is exhausted, or until the coal is completely shipped, whichever occurs first" (R. 13). The War Assets' forms of "Offer to Purchase" and "Sales Memorandum" (R. 3, 14–17), which respondent executed, contained, as one of the standard conditions of sale, the provision that "unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check,

cashier's check, or money order prior to shipment of the property or its removal by Purchaser" (R. 15, 17). The face of the Sales Memorandum signed by respondent also contained the typewritten statement in the box labeled "Terms": "Cash on presentation of wt. tickets as shipped." We think it plain from this recital that the parties' agreement was that respondent would deposit the full $17,500 in cash in the Dallas bank before any of the coal was shipped, and that the Government would receive payment from this fund as shipments were made. War Assets was anxious to assure itself of full payment for the entire load; shipment of 10,000 tons of coal would take some time, and the Administration's policy, as its sales conditions indicated, was to place no reliance on the buyer's financial standing and not to extend credit; accordingly, a cash deposit of the full sum prior to shipment was essential.

2. Just as clearly, respondent did not comply with this requirement. It first informed War Assets (on March 28, 1947) that it had deposited only $5,000 (supplied by the repurchaser, Penn-Pocahontas Coal Company) in the Dallas bank and that the balance of the funds would be placed in that bank *after* the first shipment began to move (R. 3–4, 18). War Assets immediately wired, in reply, that the Dallas bank refused to guarantee payment for all the $17,500 unless that sum was placed on deposit in the bank for that purpose. The telegram continued: "unless $17,-

500 is deposited First National Bank Dallas for payment of total quantity this coal by noon April 4 sale will be cancelled and other disposition made" (R. 20).[48] As respondent surely knew, this telegraphic notification merely carried out the contract's requirement that the full amount be deposited *in cash* prior to any shipment.

Nevertheless, on the deadline day (April 4th), respondent wired that it had placed with the Dallas bank a "letter of credit covering the balance of $12,500 for the specific purpose of meeting your invoices" (R. 22), and adding: "This places on hand in the First National Bank Dallas the full amount of $17,500 to meet this purchase" (R. 22). Since War Assets had bargained for a *cash* deposit, and not for an unknown letter of credit, it at once (April 4, 1947) expressed disapproval and again gave formal (ten day) notice of cancellation (R. 4–5, 23). At that time (April 4–10, 1947), the actual letter of credit from the New York Corn Exchange Bank had not yet been received in Dallas, and its terms were only partially known; War Assets and the Dallas bank

[48] War Assets' original letter stated that "loading must be accomplished by March 15" (R. 11); after respondent had replied that it was impossible to comply with that deadline (R. 12), War Assets' letter of March 19th waived that requirement but indicated that immediate shipment was necessary (R. 13). The Conditions of Sale required "specific shipping instructions" to be received from the purchaser "within ten (10) days from the date of the Sales Memorandum" (R. 15, 17). The Sales Memorandum was dated March 28, 1947 (R. 16).

both apparently believed that the drafts under the letter of credit would have to be paid in New York and War Assets informed the bank of its preference "that the funds should be made available to them here at this bank rather than waiting for a sight draft drawn under a letter of credit to be paid in New York" (R. 24, 25). Of course, War Assets' agreement entitled it to payment by a Texas bank it knew from previous dealings, and not by drafts on a distant New York bank, entailing delay and the risk of rejection of bills of lading.

The original letter of credit did require payment in New York (R. 26), as the Dallas Bank and War Assets surmised, and respondent then had it amended in New York, on April 14, 1947, to permit drafts and documents to be negotiated at the Dallas bank not later than June 7, 1947 (R. 27). The exhibits do not make clear the exact course of events after April 14th, nor the full understanding of the parties. On April 16th, War Assets formally cancelled the sale in a telegram to respondent which stated that the Administration had been notified by the Dallas bank that it did "not have sufficient authority to pay for this material upon presentation of invoices" (R. 29). On the same day (April 16th), a letter from the Dallas bank to War Assets' regional office quoted a telegram from the New York bank as amending the letter of credit to permit drafts and documents to be *negotiated* at the Dallas

bank's office not later than June 7, 1947, instead of being presented at the New York bank's office; the Dallas bank's letter added that it now appeared to have "the necessary authority to *pay* drawings against the above-mentioned letter of credit when presented to our office accompanied by the required documents and the original letter of credit" (R. 28; italics supplied).[49] On April 19, 1947 (three days after the cancellation), the Dallas bank transmitted to War Assets a copy of a correcting telegram received from the New York bank which stated that its earlier wire "should have read drafts and documents presented at your office not later than June seventh instead of negotiated at your office stop pay drafts when presented at your office debiting our account with your goodselves" (not included in record).

3. At the least, the foregoing documents reveal the following conclusive facts bearing on respond-

[49] If the Dallas bank were merely to negotiate the drafts, in the sense of purchasing the drafts (drawn on the New York bank) from War Assets, War Assets would remain liable to the Dallas bank should the New York institution later refuse for any reason (*e. g.*, because proper documents were not attached) to honor the draft on presentation to it. On the other hand, if the Dallas bank were fully authorized to make payment on behalf of the New York bank, the former could not go against War Assets on failure of the New York bank to reimburse it. Until receipt of definite authority to make conclusive payment, the Dallas bank was merely an advising or notifying bank, without obligation to War Assets. (Cf. R. 24–29). See Finkelstein, *Legal Aspects of Commercial Letters of Credit* (1930), pp. 146–7, 154–5, 160–3.

ent's compliance with its contractual requirements: (1) At no time was there on deposit in the First National Bank in Dallas the cash sum of $17,500 for payment of respondent's contractual obligation; (2) at least prior to April 16, 1947, War Assets correctly understood that it could not secure payment at all in Dallas but would have to present drafts and documents to the New York bank under a letter of credit; (3) on April 4, 1947, War Assets gave formal notice that the contract would be cancelled in ten days from that date unless the sum of $17,500 was on deposit with the Dallas bank by the cancellation date (*i. e.*, April 14, 1947);[50] (4) when the contract was actually cancelled twelve days later, on April 16, 1947, the required sum was not on deposit and War Assets had not even yet received unequivocal assurance that it could secure payment at all in Dallas; (5) at the time the contract was cancelled on April 16th, although the agreement called for a full advance cash deposit, respondent was prepared and willing to make payment only by means of a letter of credit which War Assets had never seen but which plainly imposed certain substantial conditions precedent to payment. The only conclusion to which these facts add up is

[50] The Conditions of Sale provided that the "Seller may also * * * in the event of default on the part of Purchaser in making payment or otherwise upon giving ten (10) days written notice to Purchaser, rescind the sale * * *" (R. 17).

that respondent did not comply with its obligation to make a cash deposit of $17,500 in its Dallas bank, but attempted to substitute payment by means of a letter of credit which, at the moment when War Assets cancelled the contract on April 16th, did not even clearly permit payment to War Assets in Dallas. And even if War Assets had been willing to forego its right to a cash deposit and to accept, in substitution, Dallas payments under a letter of credit, the terms of the letter of credit proffered by respondent would have been unsatisfactory on several important counts. See fn. 9, *supra*, p. 12. War Assets was therefore fully justified in cancelling the contract and withholding delivery, under paragraph 7 of the Conditions of Sale (fn. 50, *supra*, p. 85), as well as under Sections 53 and 65 of the Uniform Sales Act (D. C. Code, Sections 28–1402, 28–1503).[51]

B. TITLE TO THE COAL HAS NOT PASSED TO RESPONDENT

Respondent pitches its entire case against the immunity bar on the proposition that title passed to it, although the coal was never delivered to the carrier. As we have said, passage of title would not be dispositive; irrespective of a technical passage of title, this would still be a suit against the United States.[52] However, as we shall demon-

[51] This conclusion is true whether or not title had passed to respondent.

[52] If the immunity barrier be passed, respondent could not prevail in any event, regardless of the incidence of title, since

strate, title did not pass to respondent under all the conventional doctrines of sales law. True, respondent alleges in its complaint that title has passed to it (R. 6–7), but that is a pleader's conclusion which is contradicted by the complaint's own exhibits and cannot be taken as true. Cf. *Nortz* v. *United States*, 294 U. S. 317, 324–325; *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 57; *United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624, opinion of Frankfurter, J., pp. 639–640.

1. The indicia of the parties' intention, as revealed in the contractual documents, all point to retention of title by the Government, at least until the coal was loaded on the cars at Camp Maxey. First, this was a true technical *cash sale* of specific goods, in which traditionally title is exchanged for, and at the time of, payment. Cf. Vold, *Handbook of the Law of Sales*, sec. 62–66, pp. 166–177; 1 Williston, *Sales* (2d ed.), pp. 811–814; *Turner* v. *Moore*, 58 Vt. 455. Plainly, no credit was to be extended to respondent, and the Government was anxious to secure payment before losing possession or control of the coal; shipment and payment were intended to be roughly simultaneous. War Assets' acceptance letter referred to "payment upon presentation of our invoices" (R. 13). The Conditions of Sale required that "Unless credit is provided for in the

it breached the contract and the cancellation was justified. *Supra*, pp. 80–86.

Sales Memorandum, payment must be made in currency, by the Purchaser's check, Cashier's check, or money order *prior to deposit of the property or its removal by Purchaser*" (R. 17; italics supplied); and the face of the Sales Memorandum specified that the "Terms" were to be: "*Cash* on presentation of wt. tickets as shipped" (R. 16; italics supplied).

Secondly, the agreement contemplated a sale "FOB cars, Camp Maxey, north of Paris, Texas" (R. 11); the printed Conditions of Sale provided: "Unless otherwise specifically stated in the Sales Memorandum, all sales are made F. O. B. common carrier (cars or trucks) * * *" (R. 17). It is one of the guiding rules of sales law that, absent a contrary intention expressly appearing, a provision for delivery f. o. b. point of shipment is the strongest evidence of intention to pass title to the buyer at the time, and not before, the goods are delivered by the seller to the carrier and placed on board the freight cars. Note: *F. o. b. provision in sale contract as affecting time or place of passing of title*, 101 A. L. R. 292; 1 Williston, *Sales* (2d ed.), sec. 280b; Vold, *op. cit., supra*, p. 129; *Standard Casing Co.* v. *California Casing Co.*, 233 N. Y. 413, 416, 419; *Perkins* v. *Minford*, 235 N. Y. 301, 304; *Belding Hall Mfg. Co.* v. *Mercer & Ferndon Lumber Co.*, 175 Fed. 335, 338 (C. C. A. 6); *Nelson Bros. Coal Co.* v. *Perryman-Burns Coal Co.*, 48 F. 2d 99, 100 (C. C. A. 2); *In re Globe Varnish Co.*, 114 F. 2d 916, 918 (C. C. A. 7),

certiorari denied, 312 U. S. 690; *Amtorg Trading Corp.* v. *Higgins*, 150 F. 2d 536, 538–539 (C. C. A. 2); *Hettrick Mfg. Co.* v. *Srere*, 235 Mich. 306; *State ex rel. Pittsburgh Coal Co.* v. *Patterson*, 138 Wis. 475; *Rudy-Patrick Seed Co.* v. *Roseman*, 234 Iowa 597; *J. Wallworth's Sons, Inc.* v. *Daniel E. Cummings Co.*, 135 Me. 267. This presumption as to f. o. b. contracts is embodied in Rules 4 (2) and 5 of the rules for ascertaining intention as to the passage of title, contained in Section 19 of the Uniform Sales Act, which Congress has made applicable to the District of Columbia (D. C. Code, sec. 28–1203).[53] See Whitney, *Sales* (3d ed., 1941), sec. 91; *Standard Casing Co.* v. *California Casing Co., supra*; *Rudy-Patrick Seed Co.* v. *Roseman, supra*. The same rule is followed in Texas, which has not adopted the Uniform Act.

[53] "Rule 4 (2). Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 28–1204 [not relevant here]. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents.

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or to a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

Alexander v. *Heidenheimer*, 221 S. W. 942, 943 (Comm. of App. Tex.); *Ehrenberg* v. *Guerrero*, 225 S. W. 86 (Tex. Civ. App.). And there is no doubt that it applies to agreements relating to specific and ascertained goods, such as those involved here, as well as to future or unascertained goods. Cf. Uniform Sales Act, secs. 17–19, D. C. Code, secs. 28–1201 through 28–1203; Vold, *op. cit., supra*, p. 129; *Nelson Bros. Coal Co.* v. *Perryman-Burns Coal Co., supra; State ex rel. Pittsburgh Coal Co.* v. *Patterson, supra; Rudy-Patrick Seed Co.* v. *Roseman, supra; J. Wallworth's Sons, Inc.* v. *Daniel E. Cummings Co., supra* (all involving goods which were plainly specific and ascertained at the time the sales agreement was made).

Thirdly, until timely shipment, risk of loss was on the United States. Paragraph (6) of the Conditions of Sale provided: "If the property is lost, damaged, or destroyed otherwise than by the fault or negligence of Purchaser prior to removal or shipment during the applicable period prescribed in paragraph (5) above for removal or the issuance of shipping instructions, Seller's liability shall, at the election of Seller, be limited to the replacement of the property lost, damaged or destroyed or refunding any amount paid by Purchaser therefor" (R. 17).[54] The distribution of

[54] Paragraph 7 of the Conditions of Sale provided: "If Purchaser fails to issue shipping instructions or to remove the property within the applicable period prescribed in

risk of loss is another significant indication of the parties' intention as to the incidence of passage of title. Vold, *op. cit. supra*, pp. 124, 127–128; *State ex rel. Pittsburgh Coal Co.* v. *Patterson*, 138 Wis. 475. In *Nashville Industrial Corp* v. *United States*, 71 C. Cls. 405, on which respondent relies heavily (Br. in Opp., pp. 25–27), the Court of Claims stressed a specific contractual provision placing risk of loss on the purchaser as indicating its ownership of the goods. 71 C. Cls. at 418–419).[55]

Thus, we have in this case (i) an f. o. b. sale, (ii) strict insistence on cash payment preceding shipment, and (iii) risk of loss on seller prior to shipment. Separately, each of these is strong indication of an intention to pass title after loading for shipment and not before; together, their effect is conclusive.

2. Relying on the truism that all such indicia are rules of presumption subordinate to proof of the parties' actual intention, respondent urges that the Sales Memorandum's use of the terms "contract of sale" or "sale" conclusively discloses an

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paragraph (5) above the risk of loss, damage or destruction of the property shall be upon Purchaser."

[55] The contract in the *Nashville Industrial Corp.* case contained an "f. o. b. cars" shipping point provision, but the court did not consider its effect in holding that title had passed; moreover, the contract apparently permitted some credit period after shipment, and did not, as here, require payment prior to, or concurrently with, shipment. 71 C. Cls. at 410–412, 416–417.

agreement transferring the property in the goods at the moment of execution. The argument appears to be that unless the parties rigidly employ the phrase "contract to sell," a present transfer of title must have been intended (Br. in Opp., pp. 23–24).[56] But a general use of "sale" or "contract of sale" in printed standardized contract conditions, designed for all types of sales dispositions, can hardly counterbalance the specific indications pointed out above. These and similar terms are frequently used, in the same general sense, to refer to all consensual transactions disposing of property: in statutes *e. g.*, the "Uniform *Sales* Act: An Act to make Uniform the Law Relating to the *Sale* of Goods"); in texts (*e. g.*, Waite, *Sales* (2d ed.), p. xiii); in judicial opinions (*e. g., Standard Casing Co., Inc.* v. *California Casing Co., Inc.*, 233 N. Y. 413, 416 (Cardozo, J.); cf. *White* v. *Triest*, 100 Fed. 290, 291 (C. C. S. D. N. Y.)); and in commercial contracts. In the case of the latter, it has repeatedly been held that "such words are not conclusive. They are frequently used in contracts which are executory sales rather than completed sales." *Rudy-Patrick Seed Co.* v. *Roseman*, 234 Iowa 597, 602;

[56] The *reductio ad absurdum* of respondent's argument is found in the provision, attached to the War Assets form of "Offer to Purchase," by which the Government reserved the right "in connection with the *sale* of surplus property * * * to withdraw all or any part of the property included in the *sale* at any time prior to a *Contract of Sale*" (R. 15; italics supplied).

see Vold, *op. cit., supra,* p. 127; Waite, *op. cit., supra,* pp. 269–270. The narrow, technical usage espoused by respondent does not accord with normal practice. Here, the substantive provisions of the agreement relating to payment, delivery, and risk of loss—rather than the tense of the verb "to sell" used in the printed documents—determine the location of title.

Respondent also appears to claim that the case is governed by Rule 1 of Section 19 of the Uniform Sales Act (D. C. Code, Sec. 28–1203), establishing the rules for "ascertaining the intention of the parties," that "where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." But this rule only applies "unless a different intention appears," and such an intention is disclosed, as we have pointed out, by the Government's insistence on exchanging the coal for cash, by the f. o. b. clause, and by the provisions distributing the risk of loss. Moreover, an f. o. b. shipping point sale is not controlled by Rule 1, which concerns only sales in which the seller has nothing further to perform; on the contrary, since the seller is under a duty to load the goods aboard the cars, the governing rule is Rule 5, or, possibly, Rule 4 (2). 1 Williston, *Sales* (2d ed.), Secs. 264, 278, 280b; and see *supra,* pp. 88–90. Also, even where nothing remains to be done by the seller, a technical "cash

sale" is excepted from the operation of Rule 1. 1 Williston, *op. cit., supra,* p. 531.[57]

For these reasons, we submit that the respondent's own complaint reveals its plain breach of the sales agreement, and proves that, in any event, title has not passed.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below is erroneous and should be reversed.

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[57] In the court below, respondent also argued that the statutory rules for ascertaining the parties' intention regarding passage of title, as well as the other indicia of intention, come into operation only after it has been determined—by what means respondent did not indicate—that the contract is a "contract to sell" (agreeing to transfer the property in the future) and not a "sale of goods" (transferring the property immediately). Since the instant transaction was said to be a "sale of goods," it was thought that no regard need be paid to rules or other indicia. This argument is obviously fallacious. The whole purpose of the apparatus of rules is to aid in determining whether title passes as soon as the contract is made, or at a later time, and, if so, at what moment. Indeed, Rule 1 of Section 19 of the Uniform Sales Act (D. C. Code, sec. 28–1208) deals with a case in which title passes when the contract is made; on respondent's theory, this would be an absurd provision.

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